ACTS

RELATING TO

The Law of Real Property,

PASSED IN

THE LAST SESSION OF PARLIAMENT;

ALSO,

THE ACT

FOR

The Further Amendment of the Law.

WITH

NOTES AND AN INDEX,

BY

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ADVERTISEMENT.

WITH respect to the notes in the following pages, it may be proper to observe, that they are drawn chiefly from the Reports of the Real Property Commissioners, and that when reference is made to the 1st or 2nd Report, &c., the reference is to the Reports of the Real Property Commissioners, unless it be otherwise expressed.

The object of the notes is to explain concisely the view which the Commissioners had taken of the previous state of the law, and the amendments which they had thought expedient. These amendments have been generally adopted by the legislature.

It was at one time intended to have attempted an explanation of, and to have given some conjectures as to, the interpretation which might be put upon, some of the more difficult passages of the important enactments contained in the following pages; but it soon became evident that this work would be so extensive in its nature, and so uncertain as to any beneficial result, that little hesitation was felt in abandoning it*.

* As a specimen of the species of illustration here adverted to, the editor feels that no apology is necessary for submitting to the reader the following observations on the 9th sect. of the 3 & 4 W. 4, c. 106—one of the most important provisions in the act for the amendment of the law of inheritance, —for which he is indebted to his young and very able and intelligent friend, Mr. Geo. Sweet, of Lincoln's Inn.

"The enactment contained in this section combines, in a considerable degree, the fault of obscurity with that of unnecessary verbiage. The legislature, evidently desirous of making itself very clear, has contrived to express itself in language nearly unintelligible. This obscurity arises chiefly from attempting to make a distinction between the cases where the common ancestor is a "male," and where a "female," as if some great line of demarcation was to be drawn between these two cases; whereas no such intention could have been entertained, nor, in point of fact, does any such distinction exist.

"The great principle established by this act is that which renders the pa-

It may be regretted, perhaps, in some cases, that the enactments should have been so elaborately minute, how-

rent capable of inheriting from his child, or which in other words declares that the 'nearest lineal ancestor shall be capable of inheriting from his issue.' This principle, however, if left to its natural consequences, would, in certain cases, have let in the half blood of the child from whom the estate descended, before his brothers and sisters of the whole blood; as where, for instance, the child from whom the estate descended was by a second marriage, there being a son by a former marriage, this son would have taken as heir to his father before the own brother or sister of the child from whom the estate descended, had it not been provided that the issue related by the half blood to the child from whom the estate descended should take in the order of descent *after* the brothers and sisters of the whole blood, and their issue. This the legislature has expressed by saying 'that the place in which any such relation by the half blood shall stand in the order of inheritance so as to be entitled to inherit, shall be next after any relation in the same degree of the whole blood and his issue, *when the common ancestor shall be a male.*' If the act had stopped at the word 'issue,' it would have expressed all the legislature meant to say, and would have been free from obscurity. But it goes on adding the words marked in italics, and then proceeds thus: 'and next after the common ancestor, where such common ancestor shall be a female.' Now this contrasting of the case where the common ancestor is a male, with that where the common ancestor is a female, is what gives rise to all the difficulty; it being by no means obvious why the order of descent should be different, when the descent is traced brough a female, from what it is when traced through a male. It will be found, however, on looking at the Table of Descents, No. 1, that all this apparent contrast amounts to nothing at all, and that the legislative provision here introduced with so much care, is, in fact, a mere truism, and follows, as a natural consequence, from the principle that the male line of ancestors shall be exhausted before the female line be resorted to, combined with the new principle introduced by the act, that 'the parent shall inherit to the child.' Thus, suppose John Stiles to have died seised of an estate, intestate, and without issue, his father Geoffrey (No. 4), would inherit from him. Assuming Geoffrey to have died in like manner, his heir at law would take; now his heir is No. 8, a son by a former marriage to that in which John Stiles, from whom the estate descended, was born; and, consequently, without some specific provision, No. 8, the half brother of John Stiles, would have taken before his own brothers Francis (No. 5), Oliver, &c. It was *necessary*, therefore, to provide, that the brothers of the half blood should inherit *after* the brothers and sisters of the whole blood: but it was *unnecessary* to say that this should take place when the common ancestor was a male, and not when a female: because the contingency provided for could never arise in the second instance.

"This will be obvious, by remarking, that the descent is not to be traced through a female till the whole line of male ancestors has been exhausted. Let it be supposed, for instance, that the descent has to be traced through Mary Baker (No. 37); her heir must of necessity be of the half blood to the Styles's,—no person having any of the blood of the Styles's can be heir to her, they being all exhausted before the estate comes to her in a course

ever excellent the matter or important the object; and in others, perhaps, that legislation should have intermeddled at all, as in the Law of Inheritance, which was so universally understood, and produced little or no practical inconvenience. But, on the whole, with every liberal and right-thinking mind, it must be a subject of great congratulation to see the advance which the acts have made towards a better state of the Law of Real Property, and the prospect which the spirit which has produced them affords, that the blemishes and imperfections which still disfigure and obscure this important branch of our domestic jurisprudence, will speedily be swept away, and mingled with the cobwebs and lumber of bygone ages.

It was anticipated by some persons, that new forms of conveyance would have been introduced by the "Act for the Abolition of Fines and Recoveries." That, however, is not so; the act merely authorizes a tenant in tail to convey as a tenant in fee simple. Such a conveyance, if it be inrolled according to the provisions of the act (sect. 41), will, in the case of an absolute disposition by sale, pass the fee simple (sect. 15); and where the object is merely to grant a mortgage, or lease, or any other special and limited purpose,—as, for instance, where the tenant in tail simply wishes to bar the entail,—its operation will go to the extent necessary to give effect to that special object or limited purpose (sect. 21).

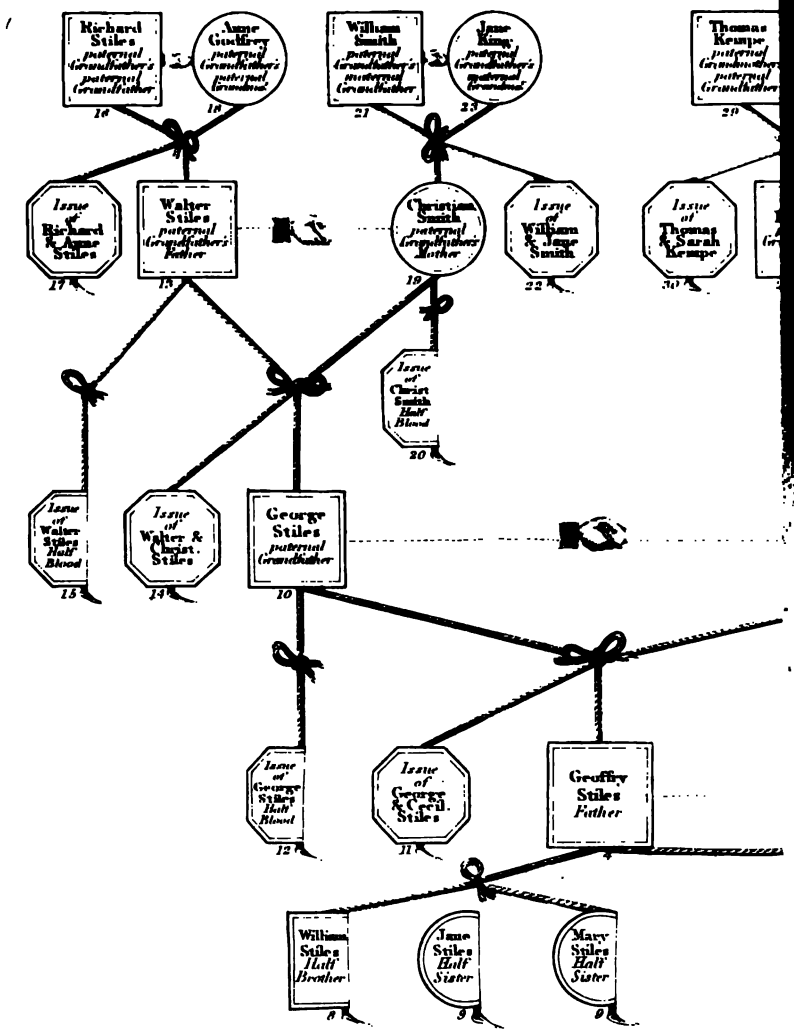
9, *Old Square, Lincoln's Inn,*
11*th Oct.* 1833.

of descent, by virtue of the rule giving the priority to the whole series of male ancestors before the female ancestors are looked to;—there never could, therefore, be any conflict between the whole and half blood, in tracing the descent through a female; consequently, it was unnecessary to make any express enactment for such a contingency."

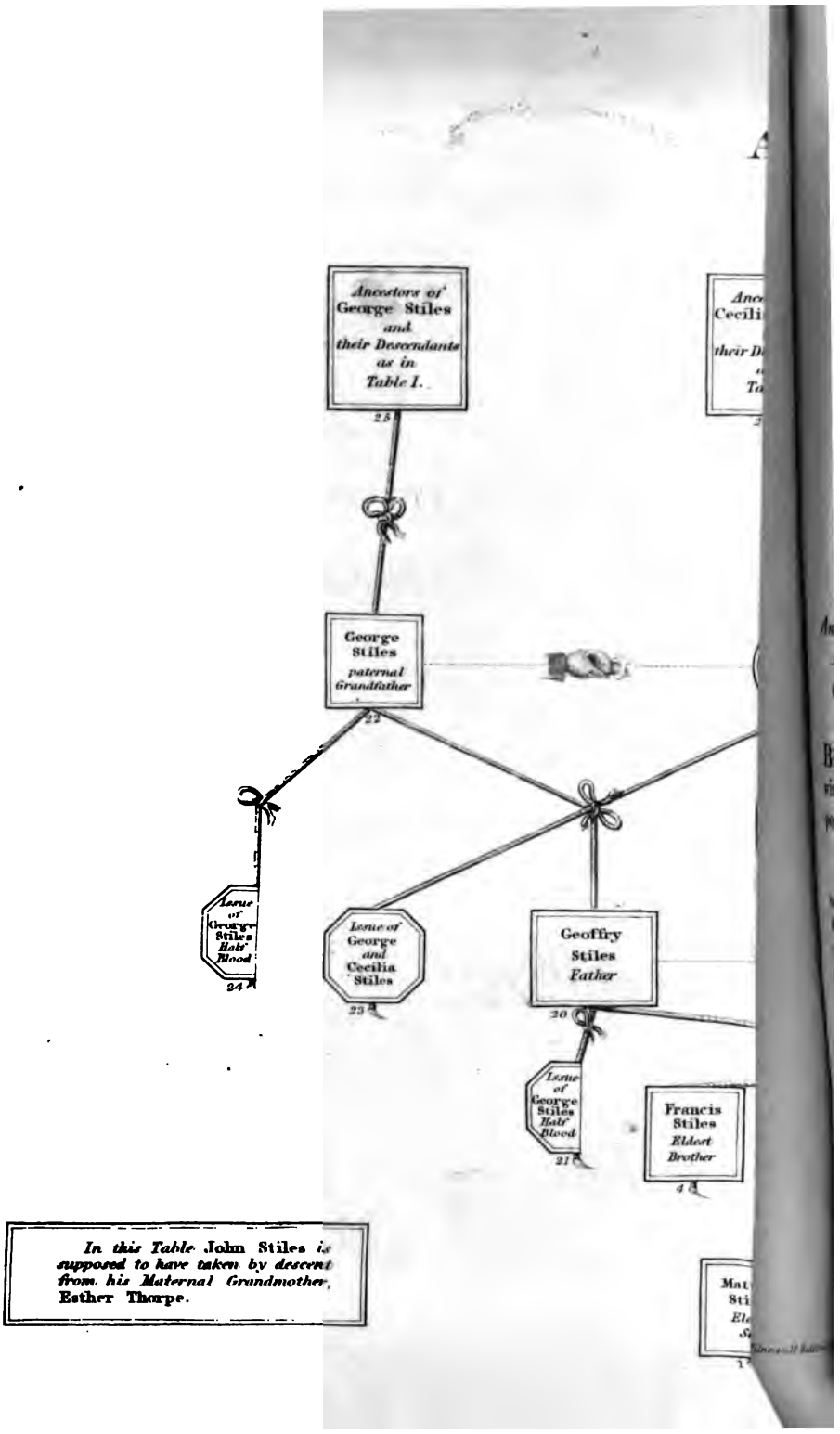
CONTENTS.

A

PATERNAL LINE



In this Table **John Stiles** *is supposed to have been the first Purchaser, taking without reference to any Ancestor*


Ancestors of George Stiles and their Descendants as in Table I.
23
George Stiles paternal Grandfather
22
Issue of George Stiles Half Blood
24
Issue of George and Cecilia Stiles
25
Geoffry Stiles Father
20
Issue of George Stiles Half Blood
21
Francis Stiles Eldest Brother
4
In this Table John Stiles is supposed to have taken by descent from his Maternal Grandmother, Esther Thorpe.

ACTS OF PARLIAMENT

RELATING TO

REAL PROPERTY, &c.

3 & 4 WILL. IV. CAP. XXVII.

t for the Limitation of Actions and Suits relating to 3 & 4 W. 4, c. 27.
l Property, and for simplifying the Remedies for
ng the Rights thereto. (*a*)

[24th July, 1833.]

enacted by the King's most Excellent Majesty, by and
ıe advice and consent of the Lords spiritual and tem-
and Commons in this present parliament assembled,

ccept as mere matter of his-
for the purpose of shewing
sive nature of the amend-
troduced into this branch of
it would be immaterial to ad-
s previous state. With this
vever, it may not be entirely
o notice briefly its leading
nd defects.

eriods of limitation which
y existed, depended mainly
32 Hen. 8, c. 2, 21 Jac. 1, c.
Hen. 7, c. 24, upon the rules
n by courts of justice re-
legal memory and presump-

Henry 8, c. 2, a writ of right
ain of an ancestor (to which,
there was no limit except the reign of Richard the First), was confined to sixty years; and a possessory action on the seisin of an ancestor to fifty years; and no real action, droitural or possessory, could be maintained by any person on his own seisin, after a lapse of thirty years; formedons in reverter or remainder, were required to be sued within fifty years; and it was enacted that no avowry or cognizance should be made for any rent or service after fifty years from the seisin of an ancestor or any other person.

The statute 21 Jac. 1, c. 16, limited the period for all writs of formedon to twenty years, and generally enacted that no person should make entry into any lands but within twenty years

3 & 4 W. 4, c. 27.

Meaning of the words in the act.

and by the authority of the same, That, the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall, in this act, except where the nature of the provision or the

next after his right of entry accrued. This, with the single exception of fine and non-claim, was the first and is the only limit by statute to a right of entry, which at common law was never taken away by lapse of time, but only by descent cast, discontinuance, or warranty.

The statute of 32 Hen. 8, c. 2, contained no saving, except as to rights which were in existence when it was passed; but 21 Jac. 1, c. 16, saved the right of persons under disability, when their rights accrued.

Besides these, the other statutes of limitation are the 9 Geo. 3, c. 16, by which the party is precluded from recovering upon a title beyond sixty years; but the operation of this act is very much limited, as it does not extend to liberties, franchises, or lands parcel of an honor which has been put in charge within sixty years, there being few lands which are not part of an honor remaining in the crown and continuing in charge; the 10 & 11 Wm. 3, c. 14, by which no writ of error for reversing a fine, or a recovery, or a judgment, can be brought after twenty years; and the 14 Geo. 3, c. 20, by which common recoveries cannot be disputed after twenty years, although the deed for making the tenant to the *præcipe* be lost, or, if the deed be produced, although the record be lost.

There were certain parties, estates, and interests, to which none of the statutes of limitation applied. For example, the statutes of limitation did not extend,—

1st. To any incorporeal hereditaments, except quit rents and prescriptive services. Rents created or reserved by deed or act of parliament, were not within the 32 Hen. 8, c. 2, s. 4, because the statute only applied to cases where it was necessary to allege seisin; although the courts were in the habit of holding, that non-payment for twenty years afforded a *primâ facie* presumption of a release, and the receipt of them for twenty years, the like presumption of a grant, —nor to prescriptions by a *que estate*, as, where the right was claimed in respect of the ownership of an estate in land, as, common appendant, or the right to require corn to be ground at a mill; nor to actions or prescriptions in discharge, as, exemption from toll or services, or from common by certain beasts, &c.; nor to actions or prescriptions for casual rights or services which might not occur during the period of limitation, as, heriots, wrecks, estrays, royal fish, &c.; nor to rights of way, water, light, and other easements; nor annuities, or legacies charged upon land, judgments, or other specialties; nor to tithes in lay hands, for, by the 31 Hen. 8, c. 13, lay proprietors have the same rights as ecclesiastical persons; nor to advowsons, for, although they were within the 32 Hen. 8. c. 2, they were exempted from any limitation by the 1 Mary, c. 5, and 7 Anne, c. 18; nor to corporations aggregate, because they have no "predecessor."

2ndly. Nor to ecclesiastical bodies, colleges, and hospitals.

3rdly. Nor to actions for dower, because seisin need not be alleged; nor writs of escheat, because the seisin is not traversable in them; nor to actions of waste, because the land is not directly in demand.

context of the act shall exclude such construction, be interpreted as follows: (that is to say,) the word "land" shall

3 & 4 W. 4, c. 27. "Land."

In many of the preceding cases, the courts have been in the habit of supplying the deficiencies of the statute law by presuming that deeds have been executed and lost; and in doing this they have adopted the period of twenty years, during which continued enjoyment or continued disuse was sufficient to found a presumption that there had been a grant or a release. It would be idle now to go into the cases on the subject, but those who may be curious will find a tolerably full account of the leading authorities on the doctrines of presuming grants and releases, in my Essay on Marketable Titles, p. 410—517.

By the effect of this act, the acts of the 2 & 3 Wm. 4, c. 100, for shortening the time required, in claims of *modus decimandi*, or exemption from, or discharge of tithes,—the 2 & 3 Wm. 4, c. 71, for shortening the time of prescription in certain cases,—and the 3 & 4 Wm. 4, c. 42, s. 3, for the limitation of actions of debt on specialties, &c. (which are given in the following pages), the statutes of limitation are now reduced to a simple and uniform system, and extended to the various classes of persons, and the various estates and interests in land, and remedies for their recovery, which were not previously within their operation.

By the 4 Hen. 7, c. 24, a fine with proclamation was made a bar to all persons having present rights of entry, and not being under any disabilities, if they did not claim within five years after the proclamation made; to all persons under disabilities, if they did not claim within five years after their disabilities were removed; and to all persons not having present rights, if they did not claim within five years after their rights of entry accrued, unless under disabilities, and then within five years after the removal of their disabilities.

The commissioners, after observing that in many cases the statutes of limitation did not sufficiently protect purchasers, and that in others (alluding probably to the act just adverted to) they restricted too much the right of recovery, make the following observations:—"But the shorter period of limitation now in use, established by the statute of 4 Hen. 7, c. 24, we consider anomalous, unjust, and mischievous. However it may have been adapted to the times in which it passed, when the quieting of titles after the long civil wars of York and Lancaster might require some extraordinary remedy, it is not suited to the present state of society. It proceeds not on the long acquiescence of the claimant or those whom he represents, which is the just ground of prescription; but on the act of the party in possession, who, to derive any benefit from it, must be considered as holding an estate to which another is legally entitled. A convenience, certainly, sometimes is experienced from a *bonâ fide* purchaser being enabled, by levying a fine with proclamation, to protect himself against a lawful title which is discovered after his purchase, and which, though using reasonable diligence, he could not have detected earlier. If the practice of acquiring a title in this manner could be confined to cases of peculiar hardship, the law would be salutary, and might on that ground be justified. But unfortunately it is equally applicable to purposes of fraud." By the act for abolishing fines, this mode of acquiring a title is in effect tacitly superseded.

3 & 4 W. 4, c. 27.

extend to manors, messuages, and all other corporeal hereditaments whatsoever, and also to tithes (other than tithes belonging to a spiritual or eleemosynary corporation sole), and also to any share, estate, or interest in them or any of them, whether the same shall be a freehold or chattel interest, and whether freehold or copyhold, or held according to any other tenure; and the word "rent" shall extend to all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole); and the person through whom another person is said to claim, shall mean any person by, through, or under, or by the act of whom, the person so claiming became entitled to the estate or interest claimed, as heir, issue in tail, tenant by the curtesy of England, tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee, or otherwise, and also any person who was entitled to an estate or interest to which the person so claiming, or some person through whom he claims, became entitled as lord by escheat; and the word "person" shall extend to a body politic, corporate, or collegiate, and to a class of creditors or other persons, as well as an individual; and every word importing the singular number only, shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only, shall extend and be applied to a female as well as a male.

"Rent."

Person through whom another claims.

"Person."

Number and gender.

No land or rent to be recovered but within 20 years after the right of action accrued.

II. And be it further enacted, That, after the thirty-first day of December, one thousand eight hundred and thirty-three, no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims; or, if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same.

III. And be it further enacted, That, in the construction of this act, the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as hereinafter is mentioned; (that is to say,) when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall, while entitled thereto, have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received; and when the person claiming such land or rent, shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt, in respect of the same estate or interest, until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death; and when the person claiming such land or rent shall claim in respect of an estate or interest in possession, granted, appointed, or otherwise assured by any instrument (other than a will) to him, or some person through whom he claims, by a person being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument; and, when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land, or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession;

When right deemed to have accrued;

in the case of estate in possession;

on dispossession;

on abatement or death;

on alienation;

in case of future estates;

3 & 4 W. 4, c. 27.

in case of forfeiture or breach of condition.

and when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition was broken. (*b*)

(*b*) The enactments of this section remove one of the greatest sources of difficulty in the investigation of title. In considering whether an estate or a right had been acquired by length of time, or would have been presumed to be so acquired, great difficulty frequently arose in ascertaining whether the possession was adverse, and, if so, when it began to be adverse, because, until the possession became adverse, no right could be acquired by length of time under the statutes of limitation, nor any foundation laid for applying the doctrines of presumption. Whether possession was or was not adverse was a question of fact to be determined by a jury, and therefore in its very nature involving great uncertainty: but, besides this, the question was frequently entangled by certain rules of law, which still further added to the embarrassment and difficulty of it.

One of these rules was, that a possession which began *rightfully* could not be considered as having become *wrongful*, that is, adverse as against the rightful owner, by being merely continued after the right of the party in possession had determined. It was also a principle, that, in case of a lease, adverse possession, so as to bar the reversioner, did not commence till the expiration of the term. The commissioners, in their first report on the law of Real Property, p. 47, observe, that, "where rent is reserved on a lease, we consider it more reasonable that the limitation should run from the time when the rent began to be received by a person claiming adversely, so that there shall not be a new period of limitation from the expiration of the lease. The receipt of rents and profits is equivalent to the occupation of the soil; the person who is in the receipt of them can do nothing more to establish his right, and the person to whom they are denied is virtually dispossessed. Where no rent, or only a nominal rent, is reserved, very slight negligence can be imputed to the reversioner, in merely not requiring a recognition of his title from the tenant, and in such cases, till the expiration of the lease, we think there should not be a commencement of adverse possession to bar the landlord. Any rent less than twenty shillings a year may for this purpose be considered nominal (Sect. 9).

"The anomaly, that, when the younger brother or other remote heir enters on the death of the ancestor, his possession is not adverse to the title of the elder brother, appears to lead to uncertainty, and may be usefully abolished.—(Sect. 13.)

"It would be desirable to permit a jury, under certain circumstances, to find the fact of adverse possession in the cases of tenants in common, joint tenants, and coparceners, without proof of actual ouster (Sect. 12, which appears to go beyond this recommendation.)

"We likewise think it would be proper to enact, that, where one individual has several estates in the same land, when his right of entry is barred as to one estate it shall be barred as to all; at present he and those claiming under him have a period of twenty years on the vesting in possession of such estate. (Sect. 20.)

3 & 4 W. 4, c. 27.

IV. Provided always, That, when any right to make an entry or distress or to bring an action to recover any land or rent by reason of any forfeiture or breach of condition shall have first accrued in respect of any estate or interest in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued in respect of such estate or interest at the time when the same shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened.

Where advantage of forfeiture is not taken by remainderman, he shall have a new right when his estate comes into possession.

V. Provided also, That a right to make an entry or distress, or to bring an action to recover any land or rent, shall be deemed to have first accrued, in respect of an estate or interest in reversion, at the time at which the same shall have become an estate or interest in possession by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof, or such rent shall have been received, notwithstanding the person claiming such land, or some person through whom he claims, shall, at any time previously to the creation of the estate or estates which shall have determined, have been in possession or receipt of the profits of such land, or in receipt of such rent.

Reversioner to have a new right.

VI. And be it further enacted, That, for the purposes of this act, an administrator claiming the estate or interest of the deceased person of whose chattels he shall be appointed administrator, shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration (*c*).

An administrator to claim as if he obtained the estate without interval after death of deceased.

(*c*) In case of intestacy, it had been decided, that, as to all rights accruing after the death of the intestate, the statutes of limitation only began to run from the grant of administration. Hence, a right to a chattel interest in lands might be kept alive notwithstanding adverse possession to the expiration of the term however long. From this rule, serious practical inconvenience frequently arose. The rule established in the text, that, as to chattel interests in land, the period of limitation should begin to run from the time when the right of entry has arisen, and might have been acquired by taking out letters of administration, will obviate this inconvenience. The next of kin and creditors cannot reasonably complain, if they neglect to enforce their rights for twenty years.

3 & 4 W. 4, c. 27.

In the case of a tenant at will, the right shall be deemed to have accrued at the end of one year.

VII. And be it further enacted, That, when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined: Provided always, that no mortgagor or cestui que trust shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee.

No person after a tenancy from year to year, to have any right but from the end of the first year or last payment of rent.

VIII. And be it further enacted, That, when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen).

Where rent amounting to 20*s.*, reserved by a lease in writing, shall have been wrongfully received, no right to accrue on the determination of the lease.

IX. And be it further enacted, That, when any person shall be in possession, or in receipt of the profits of any land, or in receipt of any rent, by virtue of a lease in writing, by which a rent amounting to the yearly sum of twenty shillings or upwards shall be reserved, and the rent reserved by such lease shall have been received by some person wrongfully claiming to be entitled to such land or rent in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent, subject to such lease, or of the person through whom he claims, to make an entry or distress, or to bring an action after the determination of such lease shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid; and no such right shall

be deemed to have first accrued upon the determination of such lease to the person rightfully entitled.

Mere entry not deemed possession.

X. And be it further enacted, That no person shall be deemed to have been in possession of any land within the meaning of this act merely by reason of having made an entry thereon.

Right not preserved by continual claim.

XI. And be it further enacted, That no continual or other claim upon or near any land, shall preserve any right of making an entry or distress, or of bringing an action.

Possession of one coparcener, &c. not possession of the others.

XII. And be it further enacted, That, when any one or more of several persons entitled to any land or rent as coparceners, joint tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons, or any of them.

Possession of a younger brother not possession of the heir.

XIII. And be it further enacted, That, when a younger brother or other relation of the person entitled as heir to the possession or receipt of the profits of any land, or to the receipt of any rent, shall enter into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the person entitled as heir.

Acknowledgment in writing equivalent to possession or receipt of rent.

XIV. Provided always, and be it further enacted, That, when any acknowledgment of the title of the person entitled to any land or rent, shall have been given to him or his agent, in writing, signed by the person in possession, or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of or by the person by whom such acknowledgment shall have been given, shall be deemed, according to the meaning of this act, to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right of such last-mentioned person, or any person claiming through him, to

3 & 4 W. 4, c. 27.

make an entry or distress, or bring an action to recover such land or rent shall be deemed to have first accrued at, and not before, the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given.

Where possession is not adverse at the passing the act, the right not barred until the end of five years after.

XV. Provided also, and be it further enacted, That, when no such acknowledgment as aforesaid shall have been given before the passing of this act, and the possession or receipt of the profits of the land, or the receipt of the rent, shall not at the time of the passing of this act have been adverse to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years herein-before limited shall have expired, make an entry or distress, or bring an action to recover such land or interest, at any time within five years next after the passing of this act.

Persons under disability of infancy, &c., or beyond seas, to be allowed ten years from the termination of their disability.

XVI. Provided always, and be it further enacted, That, if at the time at which the right of any person to make an entry or distress, or bring an action to recover any land or rent, shall have first accrued as aforesaid, such person shall have been under any of the disabilities herein-after mentioned, (that is to say), infancy, coverture, idiotcy, lunacy, unsoundness of mind, or absence beyond seas, then such person, or the person claiming through him, may, notwithstanding the period of twenty years herein-before limited shall have expired, make an entry or distress, or bring an action to recover such land or rent at any time within ten years next after the time at which the person to whom such right shall first have accrued as aforesaid, shall have ceased to be under any such disability, or shall have died (which shall have first happened) (*d*).

(*d*) The existence even of the privilege during a whole life, however long, with an addition of ten years, is an evil of no inconsiderable magnitude; and, as what is termed disability does not amount to absolute incapacity, but only to a degree of infirmity, and as, after a certain lapse of time, the hardship of putting the party in possession to defend his original right, exceeds the hardship of barring the claim of the party out of possession, notwithstanding such infirmity; we think that there should be a period of adverse possession, after which all claims against which the possession was adverse shall be barred, notwithstanding any disabilities whatever;

3 & 4 W. 4, c. 27.

But no action, &c, shall be brought beyond forty years after the right of action accrued.

XVII. Provided nevertheless, and be it further enacted, That no entry, distress, or action, shall be made or brought by any person who, at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent, shall have first accrued, shall be under any of the disabilities herein-before mentioned, or by any person claiming through him, but within forty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such forty years, or although the term of ten years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired.

No further time to be allowed for a succession of disabilities.

XVIII. Provided always, and be it further enacted, That, when any person shall be under any of the disabilities herein-before mentioned at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent, shall have first accrued, and shall depart this life without having ceased to be under any such disability, no time to make an entry or distress, or to bring an action to recover such land or rent, beyond the said period of twenty years next after the right of such person to make an entry or distress, or to bring an action to recover such land or rent, shall have first accrued, or the said period of ten years next after the time at which such

and for this purpose we propose a period of forty years. Such a provision does not seem so great an infringement upon the maxim in favour of persons incapable of suing, as the established doctrine, that, when the statute has once begun to run, it runs on notwithstanding a subsequent disability; according to which, if a father is disseised, and immediately dies, leaving a new born son his heir, the heir is barred before he is of age. This latter doctrine indeed we scarcely should have ventured to propose, were it not established law. Yet, notwithstanding its apparent rigor, we do not recommend any alteration of it, because we have not been able to learn any instance in which it has practically worked injustice.

In defence of the proposal of an absolute period of limitation, disregarding disabilities, we would observe that it is exceedingly improbable a valuable right should have accrued to a married woman, or to a luuatic, or to a person beyond seas, and should have been allowed to remain dormant for a period of forty years. On the other hand, the danger must not be overlooked, that the person in possession, by the impaired memory of witnesses, by their death, and by the loss of documents, may be deprived of the means which he may have once possessed of establishing his right.—1st Rep. 45.

3 & 4 W. 4, c. 27.

person shall have died, shall be allowed by reason of any disability of any other person.

Scotland, Ireland, and the adjacent islands, not to be deemed beyond seas.

XIX. And be it further enacted, That no part of the United Kingdom of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney, or Sark, nor any island adjacent to any of them (being part of the dominions of his Majesty), shall be deemed to be beyond seas within the meaning of this act.

When the right to an estate in possession is barred, the right of the same person to future estates shall also be barred.

XX. And be it further enacted, That, when the right of any person to make an entry or distress, or bring an action to recover any land or rent to which he may have been entitled, for an estate or interest in possession, shall have been barred by the determination of the period herein-before limited, which shall be applicable in such case, and such person shall at any time during the said period have been entitled to any other estate, interest, right, or possibility, in reversion, remainder, or otherwise, in or to the same land or rent, no entry, distress, or action, shall be made or brought by such person, or any person claiming through him, to recover such land or rent, in respect of such other estate, interest, right, or possibility, unless, in the meantime, such land or rent shall have been recovered by some person entitled to an estate, interest, or right, which shall have been limited, or taken effect, after or in defeasance of such estate or interest in possession.

Where tenant in tail is barred, remaindermen, whom he might have barred, shall not recover.

XXI. And be it further enacted, That, when the right of a tenant in tail of any land or rent to make an entry or distress, or to bring an action to recover the same, shall have been barred by reason of the same not having been made or brought within the period herein-before limited, which shall be applicable in such case, no such entry, distress, or action, shall be made or brought by any person claiming any estate, interest, or right, which such tenant in tail might lawfully have barred.

Possession adverse to a tenant in tail shall run on against the remainder-men whom he might have barred.

XXII. And be it further enacted, That, when a tenant in tail of any land or rent, entitled to recover the same, shall have died before the expiration of the period herein-before limited, which shall be applicable in such case, for making an entry or distress, or bringing an action to recover such land or rent, no person claiming any estate,

interest, or right, which such tenant in tail might lawfully have barred, shall make an entry or distress, or bring an action to recover such land or rent, but within the period during which, if such tenant in tail had so long continued to live, he might have made such entry or distress, or brought such action.

Where there shall have been possession, under an assurance, by a tenant in tail, which shall not bar the remainders, they shall be barred at the end of twenty years after the time when the assurance, if then executed, would have barred them.

XXIII. And be it further enacted, That, when a tenant in tail of any land or rent shall have made an assurance thereof, which shall not operate to bar an estate or estates, to take effect after or in defeasance of his estate tail, and any person shall, by virtue of such assurance, at the time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person, or any other person whatsoever (other than some person entitled to such possession or receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail), shall continue or be in such possession or receipt for the period of twenty years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail, or the person who would have been entitled to his estate tail, if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid; then, at the expiration of such period of twenty years, such assurance shall be and be deemed to have been effectual as against any person claiming any estate, interest, or right, to take effect after, or in defeasance of, such estate tail.

No suit in equity to be brought after the time when the plaintiff, if entitled at law, might have brought an action.

XXIV. And be it further enacted, That, after the said thirty-first day of December, one thousand eight hundred and thirty-three, no person claiming any land or rent in equity, shall bring any suit to recover the same, but within the period during which, by virtue of the provisions hereinbefore contained, he might have made an entry or distress, or brought an action to recover the same respectively, if he had been entitled at law to such estate, interest, or right, in or to the same, as he shall claim therein in equity. (*e*)

(*e*) The various statutes of limitation which have been hitherto passed in this country (with the exception of an enactment in 53 Geo. 3, c. 127, s. 5, confining suits for recovering the value of tithes to a period

3 & 4 W. 4, c. 27.

In cases of express trust, the right shall not be deemed to have accrued until a conveyance to a purchaser.

XXV. Provided always, and be it further enacted, That, when any land or rent shall be vested in a trustee, upon any express trust, the right of the cestui que trust, or any person claiming through him, to bring a suit against the trustee, or any person claim through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser, and any person claiming through him.

of six years), apply only to legal remedies, and, therefore, have no direct operation on equitable estates and interests. But, according to the maxim that "equity follows the law," courts of equity, in analogy to the statutes of limitation, have laid down rules by which they have refused relief where, if the estate of the claimant were legal instead of equitable, lapse of time would be a bar to a legal remedy. They have disregarded the periods of sixty, fifty, and thirty years, allowed for bringing writs of right and writs of entry, and (as it is now generally understood,) have adopted, as the limit of their relief, the period of twenty years given by the statute of 21 Jac. 1, c. 16, for making an entry on lands, or bringing an ejectment, adhering likewise to the statutable provisions respecting disabilities, but excepting certain cases affected by fraud or trust.

The question arises, whether the direct operation of the statutes of limitation should still be confined to legal remedies, or whether there should not be express legislative enactments upon this subject, applicable to equitable estates and interests. As adverted to above, the legislature has already begun to apply limitation to suits in equity, and we conceive that this system may now be advantageously acted upon. When the antient statutes of limitation passed, equitable jurisdiction was of small account; but a very large proportion of the real property of the country is now subject to that jurisdiction, and there seems no sufficient reason why the regulation of such property should continue to be left to the variable discretion of a judge. A case very recently occurred, where an estate subject to a mortgage in fee, being in settlement, with an ultimate limitation to the right heirs of a particular person, a stranger, on the expiration of the previous estate, entered, claiming to be entitled under the limitation; and he, and his son, upon his death, continued in quiet possession, paying interest on the mortgage, for twenty years. After a difference of opinion between judges of great eminence, it was held that the devisee of the person really entitled under the limitation, was barred by lapse of time. This decision, although generally approved of, has been censured by some, and the doctrine founded upon it may be qualified in subsequent cases. Hence, without a positive law to refer to, some uncertainty and uneasiness must prevail, and practising lawyers sometimes find it impossible to give a confident opinion upon titles submitted to them.—1st Rep. 68.

In cases of fraud, no time shall run whilst the fraud remains concealed.

XXVI. And be it further enacted, That, in every case of a concealed fraud, the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at, and not before, the time at which such fraud shall, or, with reasonable diligence, might have been, first known or discovered; provided that nothing in this clause contained shall enable any owner of lands or rents to have a suit in equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud, against any bona fide purchaser, for valuable consideration, who has not assisted in the commission of such fraud, and who, at the time that he made the purchase, did not know, and had no reason to believe, that any such fraud had been committed.

Saving the jurisdiction of equity on the ground of acquiescence or otherwise.

XXVII. Provided always, and be it further enacted, That nothing in this act contained shall be deemed to interfere with any rule or jurisdiction of courts of equity in refusing relief, on the ground of acquiescence or otherwise, to any person whose right to bring a suit may not be barred by virtue of this act.

Mortgagor to be barred at the end of twenty years from the time when the mortgagee took possession, or from the last written acknowledgment.

XXVIII. And be it further enacted, That, when a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent, comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit to redeem the mortgage, but within twenty years next after the time at which the mortgagee obtained such possession or receipt, unless, in the meantime, an acknowledgment of the title of the mortgagor, or of his right of redemption, shall have been given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person, in writing, signed by the mortgagee, or the person claiming through him; and, in such case, no such suit shall be brought but within twenty years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledg-

3 & 4 W. 4, c. 27.

ment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but, where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage-money, or land, or rent, by, from, or under, him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after, or in defeasance of, his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage, as against the person or persons entitled to any other undivided or divided part of the money, or land, or rent; and, where such of the mortgagees, or persons aforesaid, as shall have given such acknowledgment, shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgaged * money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent, on payment, with interest, of the part of the mortgage-money which shall bear the same proportion to the whole of the mortgage-money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage. (*f*)

* *Sic.*

(*f*) When a mortgagee has been twenty years in possession, without any payment, or promise, or acknowledgment, to shew that the relation of a mortgagor and mortgagee continues—the right to redeem is gone,—but evidence of any acknowledgment, in writing, or by parole, to the mortgagee, or to a stranger, or any memorandum or account found among the papers of the mortgagee, admitting or evidencing that he holds in that character, interrupts the bar. For this reason, mortgage titles are insecure, and, for a very long period, almost wholly unmarketable. When the price of land is depressed, and the mortgaged premises are not worth the mortgage money, they are abandoned by the mortgagor. From some local or general cause, or from actual improvements by the mortgagee, the value, after many years, is increased. A bill to redeem may then be supported by some expression the mortgagee is sworn to have used in conversation, or some private note, which he is compellable to divulge, written

XXIX. Provided always, and be it further enacted, (*g*) That it shall be lawful for any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other spiritual or eleemosynary corporation sole, to make an entry or distress, or to bring an action or suit, to recover any land or rent within such period as herein-after is mentioned next after the time at which the right of such corporation sole, or of his predecessor, to make such entry or distress, or bring such action or suit, shall first have accrued; (that is to say,) the period during which two persons in succession shall have held the office or benefice in respect whereof such land or rent shall be claimed, and six years after a third person shall have been appointed thereto, if the times of such two incumbencies, and such term of six years, taken together, shall amount to the full period of sixty years; and if such times, taken together, shall not amount to the full period of sixty years, then during such further number of years, in addition to such six years, as will with the time of the holding of such two persons, and such six years make up the full period of sixty years; and after the said thirty-first day of December, one thousand eight hundred and thirty-three, no such entry, distress, action, or suit, shall be made or brought at any time beyond the determination of such period.

3 & 4 W. 4, c. 27.
No lands or rents to be recovered by ecclesiastical or eleemosynary corporations sole but within two incumbencies and six years, or sixty years.

by him, within twenty years. In analogy to the salutary statute lately passed (9 Geo. 4, c. 14), respecting acknowledgments and promises to revive debts barred by the statute of limitations in personal actions, and to render adults liable for debts contracted during infancy, we propose that it should be enacted, that, where the mortgagee is in possession, the bar in equity shall not be affected by any promise, statement, or acknowledgment, unless it were in writing, and made by the mortgagee, or those claiming under the mortgagee, to the mortgagor, or those claiming under the mortgagor.—1st Rep. p. 50.

(*g*) Disputes sometimes, though rarely, arise as to the claim of the Church to the soil itself. Supposing land to have belonged to the Church in the time of Elizabeth, it cannot since have been lawfully aliened without an act of parliament. But, there ought to be a period of adverse enjoyment, which should outweigh any evidence of prior title.

It would likewise be proper to make some regulation respecting land given to a parson irregularly for tithes, and land irregularly exchanged for glebe land, where the tithes or the glebe land have been afterwards claimed; for, instances occur in which the parson recovers the tithes and retains the land given in lieu of them, or where

3 & 4 W. 4, c. 27.

No advowson to be recovered but within three incumbencies or sixty years.

XXX. And be it further enacted, That, after the said thirty-first day of December, one thousand eight hundred and thirty-three, no person shall bring any quare impedit, or other action, or any suit to enforce a right to present to or bestow any church, vicarage, or other ecclesiastical benefice, as the patron thereof, after the expiration of such period as herein-after is mentioned, (that is to say,) the period during which three clerks in succession shall have held the same, all of whom shall have obtained possession thereof adversely to the right of presentation or gift of such person, or of some person through whom he claims, if the times of such incumbencies, taken together, shall amount to the full period of sixty years; and if the times of such in-

he recovers the glebe land and retains the land received by his predecessor in exchange for it.

But the great object must be to frame a proper period, applicable to varying circumstances, for giving conclusive effect to adverse enjoyment. It has been proposed that the period should go back to the first year of Hen. 8, because not many years since, a right to tithes was established, and a composition or modus set aside, by appeal to a written document which had belonged to Glastonbury Abbey before its dissolution. On the same ground, it might equally well be carried back to the reign of Edw. 2; and if a period were to be fixed so far back as to let in all evidence which would now be available, we must adhere to the reign of Richard 1st, and allow things to remain as they are.

Every period of prescription fixed by law, supposes that some claims are excluded by it which would otherwise be established; even the existing limit of sixty years to a writ of right must bar claims which might otherwise be established; but we have proposed that the period of limitation with respect to land should be materially shortened, and we have reason to believe that this proposal has met with general approbation. There are defects necessarily inherent in all human institutions, and inconveniences will be felt, not only from existing laws, but from any amendment of them. The legislature can only consider what is likely to produce the greatest good with the least evil.

We propose a period of sixty years and two incumbencies, with three years of a third incumbency, as to exemptions from tithes, and as to moduses, compositions real, and glebe lands. A succession of incumbencies is a necessary ingredient in the proposition, on account of the risk of a particular incumbent being careless or poor, or of there being collusion between the incumbent and the patron, who has land in the parish; but any risk from the character of the individual incumbent, or from collusion between the incumbent and patron for more than two incumbencies in succession, cannot be allowed for without too great a sacrifice of the objects to be attained; and it seems not unreasonable to presume, that, within the period we propose, there may be an incumbent able and willing to assert the rights, the protection of which is left in his hands.—3rd Rep. p. 62.

cumbencies shall not together amount to the full period of sixty years, then after the expiration of such further time as with the times of such incumbencies will make up the full period of sixty years. (*h*) 3 & 4 W. 4, c. 27.

XXXI. Provided always, and be it further enacted, That, when on the avoidance, after a clerk shall have obtained possession of an ecclesiastical benefice adversely to the right of presentation or gift of the patron thereof, a Incumbencies after lapse to be reckoned within the period, but

(*h*) We have next to mention a species of real property of great importance, as to which there is at present no limitation. The possessory action of quare impedit, by which the right to an advowson is usually tried, may be brought upon any presentation, however remote. Thus, the title to an advowson may be questioned after a family has been for centuries in the undisturbed possession of it; and, upon the sale of an advowson, or of a next presentation, great trouble and expense are generally incurred in making out a title to the satisfaction of the purchaser. There must be some difficulty in framing a limitation for a species of property of so peculiar a nature. Mere length of time would not satisfy justice, unless the period were much beyond the usual bounds of living memory, because an opportunity of contesting the right may not occur more than once in a century. Lord Coke states an instance of a living of his own, in which a parson had been incumbent above fifty years; and instances might easily be mentioned, in which two successive incumbents have continued for upwards of a hundred years. But, adopting the suggestion of Mr. Justice Blackstone, whose high authority we are glad to have for this, as well as for some other amendments of the law which we propose, we think a limitation may be safely framed, compounded of length of time and number of avoidances, or rather of presentations, or opportunities to present by the patron. We conceive that (counting from the time when the title to an advowson has accrued in possession), as soon as sixty years have elapsed, and there have been three presentations, with institution and induction thereupon, by a person claiming adversely to be a patron, the right should be barred. The length of the period is required to guard against collusive avoidances and presentations; and it seems sufficient for this purpose. Presentations by the crown, on the promotion of the incumbent to a bishopric, of course will not be reckoned; but a presentation by lapse, we think, ought, as an opportunity then existed of asserting the right. It seems unnecessary to clog this limitation with disabilities which have generally not been allowed where the period exceeded twenty years; but, as against a remainder-man, after any estate less than an estate tail, the period of sixty years must be reckoned from the remainder coming into possession on the determination of the particular estate. It has been suggested that the period should be extended to one hundred years; and that the adverse possession should be a bar to all the world. It seems, however, more in analogy to the general principles of the law of England to give effect to adverse enjoyment only from the accruing of the right to be barred.—1st Rep. p. 53.

3 & 4 W. 4, c. 27.

clerk shall be presented or collated thereto by his Majesty, or the ordinary, by reason of a lapse, such last-mentioned clerk shall be deemed to have obtained possession adversely to the right of presentation or gift of such patron as aforesaid; but, when a clerk shall have been presented by his Majesty, upon the avoidance of a benefice, in consequence of the incumbent thereof having been made a bishop, the incumbency of such clerk shall, for the purposes of this act, be deemed a continuation of the incumbency of the clerk so made bishop.

not incumbencies after promotions to bishopricks.

When person claiming an advowson in remainder, &c. after an estate tail, shall be barred.

XXXII. And be it further enacted, That, in the construction of this act every person claiming a right to present to or bestow any ecclesiastical benefice as patron thereof, by virtue of any estate, interest, or right which the owner of an estate tail in the advowson might have barred, shall be deemed to be a person claiming through the person entitled to such estate tail, and the right to bring any quare impedit, action, or suit, shall be limited accordingly.

No advowson to be recovered after 100 years.

XXXIII. Provided always, and be it further enacted, That, after the said thirty-first day of December, one thousand eight hundred and thirty-three, no person shall bring any quare impedit, or other action, or any suit, to enforce a right to present to or bestow any ecclesiastical benefice, as the patron thereof, after the expiration of one hundred years from the time at which a clerk shall have obtained possession of such benefice adversely to the right of presentation or gift of such person, or of some person through whom he claims, or of some person entitled to some preceding estate or interest, or undivided share, or alternate right of presentation or gift, held or derived under the same title, unless a clerk shall subsequently have obtained possession of such benefice on the presentation or gift of the person so claiming, or of some person through whom he claims, or of some other person entitled in respect of an estate, share, or right, held or derived under the same title.

At the end of the period of limitation the right of the party out of possession to be extinguished.

XXXIV. And be it further enacted, That, at the determination of the period limited by this act to any person for making an entry or distress, or bringing any writ of quare impedit, or other action or suit, the right and title of such person to the land, rent, or advowson, for the recovery

whereof such entry, distress, action, or suit respectively, might have been made or brought within such period, shall be extinguished.

Receipt of rent to be deemed receipt of profits.

XXXV. And be it further enacted, That the receipt of the rent payable by any tenant from year to year, or other lessee, shall, as against such lessee, or any person claiming under him (but subject to the lease), be deemed to be the receipt of the profits of the land for the purposes of this act.

Real and mixed actions abolished after the 31st December, 1834;

XXXVI. And be it further enacted, That no writ of right patent, writ of right quia dominus remisit curiam, writ of right in capite, writ of right in London, writ of right close, writ of right de rationabili parte, writ of right of advowson, writ of right upon disclaimer, writ de rationabilibus divisis, writ of right of ward, writ de consuetudinibus et servitiis, writ of cessavit, writ of escheat, writ of quo jure, writ of secta ad molendinum, writ de essendo quietum de theolonio, writ of ne injuste vexes, writ of mesne, writ of quod permittat, writ of formedon in descender, in remainder, or in reverter, writ of assize of novel disseisin, nuisance, darrein-presentment, juris utrum, or mort d'ancestor, writ of entry sur disseisin, in the quibus, in the per, in the per and cui, or in the post, writ of entry sur intrusion, writ of entry sur alienation, dum fuit non compos mentis, dum fuit infra ætatem, dum fuit in prisona, ad communem legem, in casu proviso, in consimili casu, cui in vita, sur cui in vita, cui ante divortium, or sur cui ante divortium, writ of entry sur abatement, writ of entry quare ejecit infra terminum, or ad terminum qui præteriit, or causa matrimonii prælocuti, writ of aiel, besaiel, tresaiel, cosinage, or nuper obiit, writ of waste, writ of partition, writ of disceit, writ of quod ei deforceat, writ of covenant real, writ of warrantia chartæ, writ of curia claudenda, or writ per quæ servitia, and no other action real or mixed (except a writ of right of dower, or writ of dower unde nihil habet, or a quare impedit, or an ejectment), and no plaint in the nature of any such writ or action (except a plaint for freebench or dower) shall be brought after the thirty-first day of December, one thousand eight hundred and thirty-four.

except for dower, quare impedit, and ejectment.

Real actions

3 & 4 W. 4, c. 27. may be brought until the 1st June, 1835.

That, when on the said thirty-first day of December, one thousand eight hundred and thirty-four, any person who shall not have a right of entry to any land, shall be entitled to maintain any such writ or action as aforesaid, in respect of such land, such writ or action may be brought at any time before the first day of June, one thousand eight hundred and thirty-five, in case the same might have been brought if this act had not been made, notwithstanding the period of twenty years herein-before limited shall have expired.

Saving the rights of persons entitled to real actions only at the commencement of the act, &c.

XXXVIII. Provided also, and be it further enacted, That, when, on the said first day of June, one thousand eight hundred and thirty-five, any person whose right of entry to any land shall have been taken away by any descent, cast, discontinuance, or warrantry, might maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought after the said first day of June, one thousand eight hundred and thirty-five, but only within the period during which by virtue of the provisions of this act an entry might have been made upon the same land by the person bringing such writ or action, if his right of entry had not been so taken away.

No descent, warranty, &c., to bar a right of entry.

XXXIX. And be it further enacted, That no descent, cast, discontinuance, or warranty, which may happen or be made after the said thirty-first day of December, one thousand eight hundred and thirty-three, shall toll or defeat any right of entry or action for the recovery of land.

Money charged upon land and legacies to be deemed satisfied at the end of twenty years if there shall be no interest paid or acknowledgment in writing in the meantime.

XL. And be it further enacted, That, after the said thirty-first day of December one thousand eight hundred and thirty three, no action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, *or his agent,* to the person entitled thereto, or his agent;

and in such case, no such action or suit or proceeding shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments if more than one, was given. (*i*)

No arrears of dower to be recovered for more than six years.

XLI. And be it further enacted, (*k*) That, after the said thirty-first day of December, one thousand eight hundred and thirty-three, no arrears of dower, nor any damages on account of such arrears, shall be recovered or obtained by any action or suit, for a longer period than six years next before the commencement of such action or suit.

No arrears of rent or interest to be recovered for more than six years.

XLII. And be it further enacted, That, after the said thirty-first day of December, one thousand eight hundred and thirty-three, no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next

(*i*) Many were the difficulties in the investigation of title, and in proceedings for enforcing payment, which originated in the necessity of showing that money charged on land at some remote period, whether by way of mortgage, legacy, annuity, or otherwise, had been actually discharged, or that, under the circumstances of the case, a court of equity would presume that they had been discharged, and compel a purchaser to accept a title, in the absence of direct evidence that the monies in question had been paid. The leading authorities are *Oswald* v. *Leigh*, 1 Durnf. & East, 271; *Fladong* v. *Winter*, 19 Ves. 198; *Trash* v. *White*, 3 Bro. C. C. 289; *Toplis* v. *Baker*, 2 Cox, 123; *Jones* v. *Turberville*, 2 Ves. Jun. 11; *Pickering* v. *Lord Stamford*, ibid 272; *Campbell* v. *Graham*, 1 Russ. & Mylne, 453.

(*k*) With respect to certain rents there is at present no limitation, either as to title or arrears, except that of fifty years created by the statute of 32 Hen. 8, which is held to preclude any presumption of release or payment. We think the limitation as to quit rents, as well as rent-charges, and all periodical payments issuing out of land other than conventionary rents between landlord and tenant, should be assimilated to the limitation of actions as to the land itself: that what is tantamount to a dispossession for twenty years, should bar the right to the rent, and that the arrears like other debts should be barred by the lapse of six years. Where rent is reserved upon a lease under seal, there is no limitation as to the arrears, although, in practice, where there is no proof of acknowledgment, a jury is directed to presume payment after twenty years. We conceive that a positive bar would be much preferable to a presumption, which may be rebutted; and we see no reason why annual payments should be allowed to be sued for after the expiration of six years, whether they may have been secured by deed, or only arise from simple contract.—1st Rep. p. 50.

3 & 4 W. 4, c. 27.

after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent: Provided nevertheless, that, where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years.

Act to extend to the spiritual courts.

XLIII. And be it further enacted, That, after the said thirty-first day of December, one thousand eight hundred and thirty-three, no person claiming any tithes, legacy, or other property, for the recovery of which he might bring an action or suit at law or in equity, shall bring a suit or other proceeding in any spiritual court to recover the same, but within the period during which he might bring such action or suit at law or in equity.

Act not to extend to Scotland, nor to advowsons in Ireland.

XLIV. Provided always, and be it further enacted, That this act shall not extend to Scotland; and shall not, so far as it relates to any right to permit * to or bestow any church, vicarage, or other ecclesiastical benefice, extend to Ireland.

Act may be amended.

XLV. And be it further enacted, That this act may be amended, altered, or repealed during this present session of parliament.

* *Sic.* "Present."

2 & 3 WILL. IV. CAP. LXXI.

An Act for shortening the Time of Prescription in certain Cases. 2 & 3 W. 4, c. 71.

[1st August, 1832.]

WHEREAS the expression 'time immemorial, or time whereof the memory of man runneth not to the contrary,' is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long enjoyed is sometimes defeated by showing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice; for remedy thereof, be it enacted, by the King's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal and Commons in this present parliament assembled, and by the authority of the same, That no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any right of common or other profit or benefit to be taken and enjoyed from or upon any land of our Sovereign Lord the King, his heirs or successors, or any land being parcel of the Duchy of Lancaster, or of the Duchy of Cornwall, or of any ecclesiastical or lay person, or body corporate, except such matters and things as are herein specially provided for, and except tithes, rent, and services, shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto, without interruption for the full period of thirty years, be defeated or destroyed by shewing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years, but nevertheless, such claim may be defeated in any other way by which the same is now liable to be defeated; and when such right, profit, or benefit shall have been so taken and enjoyed as aforesaid, for the full period of sixty years, the right thereto shall be deemed absolute

Claims to right of common and other profits a prendre, not to be defeated after thirty years' enjoyment by shewing the commencement;

after sixty years' enjoyment the right to be absolute, unless had

2 & 3 W. 4, c. 71.

and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

by consent or agreement.

In claims of right of way or other easement, the periods to be twenty years and forty years.

II. And be it further enacted, (*a*) That no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over, or from any land or water of our said lord the King, his heirs or successors, or being parcel of the Duchy of Lancaster or of the Duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by shewing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

(*a*) Previous to this act, the prescriptive rights to profits and easements, to be taken in or enjoyed over the soil of another, could only be established by what was deemed legal proof of an enjoyment of nearly 650 years,—these rights not being within the operation of the 32 Hen. 8, and, consequently, the reign of Rich. 1 being considerd the commencement of legal memory for all purposes at the present day. In many cases, the courts created a remedy to this absurd rule, by holding that proof of enjoyment as far back as living witnesses could speak, raised a presumption of an enjoyment from the remote era. This remedy, however, frequently failed, inasmuch as a right claimed by prescription was always disproved, by shewing that it did not, or could not, exist at any one given point of time since the commencement of legal memory; or, although it originated before the commencement of legal memory, that, at some subsequent period, the *servient* tenement, or that over which the right was exercised, and the *dominant* tenement, or that to which the right was attached, once belonged to the same individual, whereby the prescriptive right was extinguished. To obviate these difficulties, it had recently become the practice to presume a grant of the right in question

2 & 3 W. 4, c. 71.

Claim to the use of light enjoyed for 20 years indefeasible, unless shewn to have been by consent.

III. And be it further enacted, That, when the access and use of light to and for any dwelling-house, workshop, or other building, shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some

to have been made by a tenant in fee of the servient tenement to a tenant in fee of the dominant tenement, to have been made subsequent to the period at which the right was shewn to have been commenced or extinguished. (As to presuming the grant of a *right of way*, see *Campbell* v. *Wilson*, 3 East, 294—as to presuming a *right of water*, *Wright* v. *Howard*, 1 Sim. & Stu. 203—and as to a *right to the enjoyment of light*, *Cross* v. *Lewis*, 2 Barn. & Cress, 689). Even this expedient, independently of the objection, arising out of its being known by all parties to be a mere fiction, frequently failed by its being shewn that the title of the two tenements was such, that the presumed grant could not have been made in the manner alleged in the plea.

The commissioners, moved by these considerations, proposed to amend the law as follows:—"We propose that legal memory, with respect to this species of property, shall always be taken to be sixty years *ante litem motam*, or rather, that adverse enjoyment during this period shall be conclusive evidence of a right to such profit or easement. It will still be for a jury to determine, in case of dispute, whether the right has been exercised conventionally or adversely, and there will be no greater danger than at present of a licence or limited grant becoming the foundation of a prescriptive right; but it must not be open to the party denying the right to contend, that, from leases or other particular estates, it could not have been lawfully granted by the occupier of the soil within sixty years. It can only be in very rare cases that the owner of the fee, or at least an estate of inheritance, has not been in possession during some part of such a period; and, even in that case, he might have put an end to any usurped right, by bringing an action on the case for an injury to his reversion by the exercise of it. Without making adverse enjoyment during the new period of limitation *conclusive* evi- of the right, comparatively little advantage would arise from the reduced limit of legal memory. The disabilities of the parties against whom this prescription is to run must likewise be disregarded.

But we are of opinion, with respect both to profits and easements, a shorter period, namely twenty years, should also be established, as affording presumptive evidence of right, liable to be rebutted by proof that during that time the servient tenement was occupied under a lease, or was held by a tenant for life, or by a person under disability. At present, the exercise of a right of common, or the use of a way, or of water, or any easement, for twenty years, constitutes a *primâ facie* case to establish the right; and the rule may be continued without inconvenience.—1st Rep. p. 51.

2 & 3, W. 4, c. 71.

consent or agreement expressly made or given for that purpose by deed or writing.

Before mentioned periods to be deemed those next before suits for claims to which such periods relate.

IV. And be it further enacted, That each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question, and that no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made.

In actions on the case the claimant may allege his right generally, as at present.

V. And be it further enacted, That, in all actions upon the case and other pleadings, (*b*) wherein the party claiming may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient, and, if the same shall be denied, all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and that, in all pleadings to actions of trespass, and in all other pleadings wherein before the passing of this act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed for and during such of the periods mentioned in this act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done: and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or on any cause or matter of fact or of law, not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation.

In pleas to trespass and other pleadings, where party used to allege his claim from time immemorial, the period mentioned in this act may be alleged; and exceptions or other matters to be replied specially.

(*b*) We think the necessity of alleging the grant of an easement in pleading might in all cases be dispensed with. The right to an ease-

2 & 3 W. 4, c. 71.

Restricting the presumption to be allowed in support of claims herein provided for.

VI. And be it further enacted, That, in the several cases mentioned in and provided for by this act, no presumption shall be allowed or made in favour or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this act, as may be applicable to the case and to the nature of the claim.

Proviso for infants, &c.

VII. Provided also, That the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned shall have been or shall be an infant, idiot, non compos mentis, feme covert, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible.

What time

VIII. Provided always, and be it further enacted, That,

ment, generally speaking, is, in truth, acquired, not by any deed, but by the acquiescence, for a given period, of a person competent to interrupt the right; and this is now in substance considered equivalent to a grant, though no grant be executed. In a declaration for disturbance of an easement, it is enough to state that the plaintiff is possessed of the tenement, and that the right is appurtenant to it. When an action is brought for any thing done in the exercise of the right, there seems to be no sufficient reason why the right must be traced to its origin, or why it should not be permitted in the plea, as well as in the declaration, to allege the defendant's possession of the tenement, and that, by reason thereof, he is entitled to the right as appurtenant. The party should not be put under greater difficulties, if he be in possession, and an action is brought against him for exercising the right, than if he be out of possession, and he brings an action for the obstruction. The evidence is the same in both cases, and we think the party who claims the right, whether plaintiff or defendant, should be allowed simply to allege that he is entitled to it as belonging to the tenement in respect of which it is claimed; and to establish it presumptively by proving an adverse enjoyment of twenty years, and conclusively by an adverse enjoyment of sixty years. Prescribing in a *que estate*, that is, in right of the owner of the fee, and those whose estate he has, and tracing both to the possession of the dominant tenant, from the owner of the fee, would thus be dispensed with, and records in actions of trespass to try these rights materially shortened and simplified. Where there is an actual grant, it may be rendered available, as now, in pleading and in proof.—1st Rep. p. 52.

2 & 3 W. 4, c. 71.

to be excluded in computing the term of forty years appointed by this act.

when any land or water, upon, over, or from which any such way or other convenient watercourse or use of water shall have been or shall be enjoyed or derived, hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof.

Not to extend to Scotland or Ireland.

IX. And be it further enacted, That this act shall not extend to Scotland or Ireland.

Commencement of act.

X. And be it further enacted, That this act shall commence and take effect on the first day of Michaelmas Term now next ensuing.

Act may be amended.

XI. And be it farther enacted, That this act may be amended, altered, or repealed, during this present session of parliament.

2 & 3 WILL. IV. CAP. C.

An Act for shortening the Time required in Claims of Modus decimandi, or Exemption from or Discharge of Tithes.

2 & 3 W. 4, c. 100.

[9th August, 1832.]

WHEREAS the expense and inconvenience of suits instituted for the recovery of tithes may and ought to be prevented, by shortening the time required for the valid establishment of claims of a modus decimandi, or exemption from or discharge of tithes; Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal and Commons in this present parliament assembled, and by the authority of the same, That all prescriptions and claims of or for any modus decimandi, or of or to any exemption from or discharge of tithes, by composition real or otherwise, shall, in cases where the render of tithes in kind shall be hereafter demanded by our said lord the King, his heirs or successors, or by any Duke of Cornwall, or by any lay person, not being a corporation sole, or by any body corporate of many, whether temporal or spiritual, be sustained and be deemed good and valid in law, upon evidence shewing, in cases of claim of a modus decimandi, the payment or render of such modus, and, in cases of claim to exemption or discharge, shewing the enjoyment of the land without payment or render of tithes, money, or other matter in lieu thereof, for the full period of thirty years next before the time of such demand, unless, in the case of claim of a modus decimandi, the actual payment or render of tithes in kind, or of money or other thing differing in amount, quality, or quantity from the modus claimed, or, in case of claim to exemption or discharge, the render or payment of tithes, or of money or other matter in lieu thereof, shall be shewn to have taken place at some time prior to such thirty years, or it shall be proved that such payment or render of modus was made, or enjoy-

What prescriptions and claims of modus decimandi to be valid in law.

2 & 3 W. 4, c. 100.

ment had, by some consent or agreement expressly made or given for that purpose by deed or writing; and, if such proof in support of the claim shall be extended to the full period of sixty years next before the time of such demand, in such cases the claim shall be deemed absolute and indefeasible, unless it shall be proved that such payment or render of modus was made, or enjoyment had, by some consent or agreement expressly made or given for that purpose by deed or writing; and, where the render of tithes in kind shall be demanded by any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other corporation sole, whether spiritual or temporal, then every such prescription or claim shall be valid and indefeasible, upon evidence shewing such payment or render of modus made, or enjoyment had, as is hereinbefore mentioned, applicable to the nature of the claim, for and during the whole time that two persons in succession shall have held the office or benefice in respect whereof such render of tithes in kind shall be claimed, and for not less than three years after the appointment and institution or induction of a third person thereto: Provided always, that, if the whole time of the holding of such two persons shall be less than sixty years, then it shall be necessary to shew such payment or render of modus made, or enjoyment had (as the case may be), not only during the whole of such time, but also during such further number of years, either before or after such time, or partly before and partly after, as shall with such time be sufficient to make up the full period of sixty years, and also for and during the further period of three years after the appointment and institution or induction of a third person to the same office or benefice, unless it shall be proved that such payment or render of modus was made, or enjoyment had, by some consent or agreement expressly made or given for that purpose by deed or writing. (*a*)

Proviso.

(*a*) The subjects to be considered in framing a statute of limitations for the Church, are; 1. The entire exemption of land from tithes; 2. Moduses or customary payments in lieu of tithes; 3. Compositions real; and, 4. Glebe lands.

1. ENTIRE EXEMPTION OF LAND FROM TITHES.

As the law stands, non-payment of tithes for any period, however long, is no ground of exemption.

In this respect, an unjust advantage is practically enjoyed by the Church.

II. And be it further enacted, That every composition for tithes which hath been made or confirmed by the decree of any court of equity in England, in a suit to which the ordinary, patron, and incumbent were parties, and which hath

2 & 3 W. 4, c. 100.

What compositions for tithes shall be considered valid.

The general rule, that long usage may have had a legal origin, is here neglected. The usage is presumed to be wrongful, and the burthen is cast upon the party in whose favour it is to support it by strict legal evidence. This is difficult in proportion to the length of time the usage has subsisted; and the title which ought to be the safest is the most insecure.

There is reason to apprehend that cases occur in which legal exemption cannot be made out by legal evidence, particularly where the non-payment has originated in the existence of customary payment in lieu of tithes so small as to have been neglected and forgotten. Here justice requires that the exemption should be absolute.

Supposing that the owner who claims the exemption is in a condition to prove, by strict legal evidence, that his land antiently belonged to a religious house, and may lawfully be discharged from the payment of tithes, he succeeds after much harassing litigation, and the costs awarded to him are very insufficient indemnity for the expense he has necessarily incurred.

We see no objection to enacting, that, where there has been non-payment of tithes as of right for a certain number of years, and during a certain number of incumbencies, such non-payment alone shall be sufficient to establish the exemption.

2. MODUSES.

The attempts to set aside parochial and farm moduses cause much more vexation and general mischief. Where such moduses exist, the land is supposed to be subject to tithes; but, instead of their being paid in kind, and to the full extent, small payments are made, such as 1*d.* for a calf, 1*d.* for a garden, 1*d.* for the agistment of each barren cow, 1*d.* for the milk of a cow, 1*d.* for a colt, 2*d.* per acre for hay, 6*d.* for farm A. in lieu of tithe hay, 3d. for farm B. in lieu of agistment tithe, 1*s.* for farm C. in lieu of all tithes whatsoever. These moduses are supposed to have arisen from agreements of immemorial antiquity between the tithe owner and the tithe payer, for their mutual benefit; such agreements have antiently been permitted by the law.

Where these customs exist they ought to be respected as much as the right of tithes in kind where there is no modus, or as the right to the soil itself.

Yet the rules laid down by courts of justice on this subject render many cases of modus open to question, and have often caused moduses which had subsisted without question for centuries to be set aside. The most formidable objection to a modus is rankness. To be valid, a modus must be deemed to have subsisted from the reign of Richard I., as the period of legal memory; and, if the payment be considered greater than the tithe of the articles covered by the modus was then worth, it is set aside; notwithstanding the uncertainty of such speculations, and the possibility that the owner of the land, out of love to the church, or for the good of his own soul, may have agreed to pay annually, in lieu of tithes, a larger sum than the tithes were then worth.

Many questions of great nicety as to the certainty of the custom, and of the lands which it covers, have the same tendency to bring the matter

2 & 3 W. 4, c. 100.

not since been set aside, abandoned, or departed from, shall be, and the same is hereby confirmed and made valid in law; and that no modus, exemption, or discharge shall be deemed to be within the provisions of this act, unless such modus, exemption, or discharge shall be proved to have ex-

into doubt, and to encourage litigation.

The first effect of a suit to set aside a modus, is, to involve the incumbent in bitter hostility with his parishioners. The expense to both parties often exceeds the value of the subject in dispute; but it falls most heavily on the clergyman, because his opponents are frequently numerous, and aid each other. Whenever the incumbent succeeds in setting aside a long established modus, there is a strong feeling that injustice is done; for, he accepted the living when the modus prevailed, and the advowson and all the lands in the parish have been probably repeatedly sold on the basis of the modus; so that, when it is set aside, one party loses what he had bought and had long enjoyed, and another gets what he had not bought and never expected to enjoy.

A modus was recently set aside which had certainly subsisted ever since the reign of Edward II., by the discovery of a document which shewed that it originated in that reign. Other cases, almost equally strong, have been recently decided in the same way. (*Lord Kensington* v. *Pugh*, 1 Younge, 125; *Lediard* v. *Anstie*, 3 Younge & Jervis, 548: *Short* v. *Lee*, 2 Jac. & Walk. 464; *Norton* v. *Hammond*, 1 Younge & Jervis, 94; *Fisher* v. *Lord Graves*, 1 M'Cleland & Younge, 362; *Dennison* v. *Elsley*, 1 M'Cleland and Younge, 1; *Ross* v. *Aylesbury*, not yet reported; *Lambert* v. *Fisher*, Kirkby's Rental Case, before V.C., M. T. 1830).

We think, that, with respect to moduses and exemptions, a reasonable period of actual enjoyment may be safely assumed as the criterion of the rights of the clergy and the laity.

3. COMPOSITIONS BILL.

This remedy would apply equally to the third case, that of real composition. This differs from modus principally in the time of its commencement. It is an agreement for a commutation of tithes that might have been made with the consent of the incumbent, patron, and ordinary, at any time prior to the 13th Elizabeth. It is not liable to the objection of rankness.

By the rule, however, now established, a composition real is not to be presumed from any length of usage consistent with it, but it must be established by proof or positive evidence of the existence at some time of a deed which must at least be as old as the 13th Eliz., and may be several centuries older.

This doctrine, no less than that which requires positive proof of the ground of exemption from payment of tithes, militates against the general maxim of the law, that what has long existed shall, in favour of peaceable enjoyment, be presumed to have had a legal origin. We believe that the rule which requires positive evidence of a deed to establish a composition real, operates, in many cases, against the truth of the transaction.

4. GLEBE LANDS.

See ante, p. 17, n. (g), where the report of the commissioners on this head is stated at length.—3rd Rep. p. 60.

listed and been acted upon at the time of, or within one year next before the passing of this act. 2 & 3 W. 4, c. 100.

III. Provided always, That this act shall not be prejudicial or available to or for any plaintiff or defendant in any suit or action, relative to any of the matters before mentioned, now commenced, or which may be hereafter commenced, during the present session of parliament, or within one year from the end thereof. The act not available in any suit now commenced, &c.

IV. Provided also, and be it further enacted, That this act shall not extend or be applicable to any case where the tithes of any lands, tenements, or hereditaments shall have been demised by deed for any term of life or number of years, or where any composition for tithes shall have been made by deed or writing, by the person or body corporate entitled to such tithes, with the owner or occupier of the land, for any such term or number of years, and such demise or composition shall be subsisting at the time of the passing of this act, and where any action or suit shall be instituted for the recovery or enforcing the payment of tithes in kind within three years next after the expiration, surrender, or other determination of such demise or composition. To what cases this act shall not extend.

V. Provided also, and be it further enacted, That, where any lands or tenements shall have been or shall be held or occupied by any rector, vicar, or other person entitled to the tithes thereof, or by any lessee of any such rector, vicar, or other person, or by any person compounding for tithes with any such rector, vicar, or other person, or by any tenant of any such rector, vicar, or other person, or of any such lessee or compounder, whereby the right to the tithes of such lands or tenements may have been or may be during any time in the occupier thereof, or in the person entitled to the rent thereof, the whole of every such time and times shall be excluded in the computation of the several periods of time hereinbefore mentioned. Time during which lands shall be held by persons entitled to the tithes thereof to be excluded in the computation under this act;

VI. Provided also, That the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned, shall have been or shall be an infant, idiot, non compos mentis, feme covert, or lay tenant for life, or during which any action or suit shall have been pend- as also the time during which any person capable of resisting any claim shall

2 & 3 W. 4, c. 100.

be an infant, &c.

ing, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible.

What it shall be sufficient to allege in actions commenced under this act.

VII. And be it further enacted, That, in all actions and suits to be commenced after this act shall take effect, it shall be sufficient to allege that the modus, or exemption, or discharge claimed, was actually exercised and enjoyed for such of the periods mentioned in this act as may be applicable to the case; and, if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, deed, or writing herein mentioned, or any other matter of fact or of law not inconsistent with the simple fact of the exercise and enjoyment of the matter claimed, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of the matter claimed.

No presumption allowed in support of any claim for any less period than mentioned in this act.

VIII. And be it further enacted, That, in the several cases mentioned in and provided for by this act, no presumption shall be allowed or made in favour or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this act as may be applicable to the case and to the nature of the claim.

Act to extend to England only.

IX. Provided also, and be it further enacted, That this act shall not extend to Scotland or Ireland.

3 & 4 WILL. IV. CAP. LXXIV.

An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance (*a*). 3 & 4 W. 4. c. 74.

[28th August, 1833.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal and Commons in this present parliament assembled, and by the authority of the same, that, in the construction of this act, the word "lands" shall extend to manors, advowsons, rectories, messuages, lands, tenements, tithes, rents, and hereditaments of any tenure (except copy of court-roll), and whether corporeal or incorporeal, and any undivided share thereof, but, when accompanied by some expression including or denoting the tenure by copy of court-roll, shall extend to manors, messuages, lands, tenements, and hereditaments of that tenure, and any undivided share thereof; and the word "estate" shall extend to an estate in equity as well as at law, and shall also extend to any interest, charge, lien, or incumbrance in, upon, or affecting lands, either at law or in equity, and shall also extend to any interest, charge, lien or incumbrance in, upon, or affecting money subject to be invested in the purchase of lands; and the expression "base fee" shall mean exclusively that estate in fee simple into which an estate tail is converted where the issue in tail are barred, but persons claiming estates by way of remainder or otherwise are not barred; and the expression "estate tail," in addition to its usual meaning, shall mean a base fee into which an estate tail shall have been converted; and the expression "actual

Meaning of certain words and expressions. "Lands."

"Estate."

"Base fee."

"Estate tail."

(*a*) The ordinary objects and effects of fines and recoveries are so well understood, or so readily ascertained by a reference to the treatises on conveyancing, that it would be idle to recur to them here. It will be sufficient to observe, that, of the objects effected by fines and recoveries, two only are provided for by this statute, namely, the barring of entails and the passing and extinguishing of the estates, rights, and interests, of married women.

8 & 4 W. 4, c. 74.

tenant in tail" shall mean exclusively the tenant of an estate tail which shall not have been barred, and such tenant shall be deemed an actual tenant in tail, although the estate tail may have been divested or turned to a right; and the expression "tenant in tail" shall mean, not only an actual tenant in tail, but also a person who, where an estate tail shall have been barred and converted into a base fee, would have been tenant of such estate tail if the same had not been barred; and the expression "tenant in tail entitled to a base fee," shall mean a person entitled to a base fee, or to the ultimate beneficial interest in a base fee, and who, if the base fee had not been created, would have been actual tenant in tail; and the expression "money subject to be invested in the purchase of lands" shall include money, whether raised or to be raised, and whether the amount thereof be or be not ascertained, and shall extend to stocks and funds, and real and other securities, the produce of which is directed to be invested in the purchase of lands, and the lands to be purchased with such money or produce shall extend to lands held by copy of court-roll, and also to lands of any tenure in Ireland or elsewhere out of England, where such lands or any of them are within the scope or meaning of the trust or power directing or authorizing the purchase; and the word "person" shall extend to a body politic, corporate, or collegiate, as well as an individual; and every word importing the singular number only shall extend and be applied to several persons or things, as well as one person or thing; and every word importing the plural number shall extend and be applied to one person or thing, as well as several persons or things; and every word importing the masculine gender only shall extend and be applied to a female as well as a male; and every assurance already made or hereafter to be made, whether by deed, will, private act of parliament, or otherwise, by which lands are or shall be entailed, or agreed or directed to be entailed, shall be deemed a settlement; and every appointment made in exercise of any power contained in any settlement, or of any other power arising out of the power contained in any settlement, shall be considered as part of such settlement, and the estate created by such appointment shall be considered

"Actual tenant in tail."

"Tenant in tail."

"Tenant in tail entitled to a base fee."

"Money."

"Person."

Number and gender.

Settlement.

as having been created by such settlement; and, where any such settlement is or shall be made by will, the time of the death of the testator shall be considered the time when such settlement was made: Provided always, that those words and expressions occurring in this clause, to which more than one meaning is to be attached, shall not have the different meanings given to them by this clause in those cases in which there is anything in the subject or context repugnant to such construction. 3 & 4 W. 4, c. 74.

No fine or recovery to be levied or suffered after the 31st of Dec. 1833.

II. And be it further enacted, That, after the thirty-first day of December, one thousand eight hundred and thirty-three, no fine shall be levied, or common recovery suffered of lands of any tenure, except where parties intending to levy a fine or suffer a common recovery shall, on or before the thirty-first day of December, one thousand eight hundred and thirty-three, have sued out a writ of dedimus, or any other writ, in the regular proceedings of such fine or recovery; and any fine or common recovery which shall be levied or suffered contrary to this provision shall be absolutely void.

Persons liable after 31st Dec. 1833 to levy fines or suffer recoveries under covenants to effect the purposes intended by means of this act; but, in any case where the purpose of a fine or recovery cannot be so effected, the persons liable to levy fines or suffer recoveries shall execute a deed which shall have the same opera-

III. And be it further enacted, That, in case any person shall, after the thirty-first day of December, one thousand eight hundred and thirty-three, be liable to levy a fine or suffer a common recovery of lands of any tenure, or to procure some other person to levy a fine or suffer a common recovery of lands of any tenure, under a covenant or agreement already entered into, or hereafter to be entered into, before the first day of January, one thousand eight hundred and thirty-four, then and in such case, if all the purposes intended to be effected by such fine or recovery can be effected by a disposition under this act, the person liable to levy such fine or suffer such recovery, or to procure some other person to levy such fine or suffer such recovery, shall, after the thirty-first day of December, one thousand eight hundred and thirty-three, be subject and liable under such covenant or agreement, to make, or to procure to be made, such a disposition under this act, as will effect all the purposes intended to be effected by such fine or recovery; but, if some only of the purposes intended to be effected by such fine or recovery can be effected by a disposition under this

3 & 4 W. 4, c. 74.

tion as the fine or recovery.

act, then the person so liable to levy such fine or suffer such recovery, or to procure some other person to levy such fine or suffer such recovery as aforesaid, shall, after the thirty-first day of December, one thousand eight hundred and thirty-three, be subject and liable under such covenant or agreement, to make, or procure to be made, such a disposition under this act as will effect such of the purposes intended to be effected by such fine or recovery as can be effected by a disposition under this act; and, in those cases where the purposes intended to be effected by such fine or recovery, or any of them, cannot be effected by any disposition under this act, then the person so liable to levy such fine or suffer such recovery, or to procure some other person to levy such fine or suffer such recovery as aforesaid, shall, after the thirty-first day of December, one thousand eight hundred and thirty-three, be liable, under such covenant or agreement, to execute, or to procure to be executed, some deed whereby the person intended to levy such fine or suffer such recovery, shall declare his desire that such deed shall have the same operation and effect as such fine or recovery would have had if the same had been actually levied or suffered; and the deed by which such declaration shall be made shall, if none of the purposes intended to be effected by such fine or recovery can be effected by a disposition under this act, have the same operation and effect in every respect as such fine or recovery would have had if the same had been actually levied or suffered; but, if some only of the purposes intended to be effected by such fine or recovery can be effected by a disposition under this act, then the deed by which such declaration shall be made shall, so far as the purposes intended to be effected by such fine or recovery cannot be effected by a disposition under this act, have the same operation and effect in every respect as such fine or recovery would have had if the same had been actually levied or suffered.

Fines and recoveries of lands in ancient demesne, when levied or suffered

IV. And be it further enacted, That no fine already levied in a superior court of lands of the tenure of ancient demesne which hath not been reversed, and no fine hereafter to be levied of lands of that tenure, shall, upon a writ of deceit already brought by the lord of the manor of which

3 & 4 W. 4, c. 74.

in a superior court, may be reversed as to the lord by writs of deceit the proceedings in which are now pending, or by writs of deceit hereafter to be brought, but shall be as valid against the parties thereto, and persons claiming under them, as if not reversed as to the lord.

the lands were parcel, the proceedings in which are now pending, or upon a writ of deceit which at any time after the passing of this act may be brought by the lord of the said manor, be reversed as to any person except the lord of the same manor; and the court shall order such fine to be vacated only as to the lord of the said manor; and every such fine which may be reversed as to the lord of the said manor upon such writ of deceit as aforesaid, shall still remain as good and valid against and as binding upon the conusors thereof, and all persons claiming under them, as such fine would have been if the same had not been reversed by such writ of deceit as aforesaid; and no common recovery already suffered in a superior court of lands of the tenure of ancient demesne which hath not been reversed, and no common recovery hereafter to be suffered of lands of that tenure, shall, upon a writ of deceit already brought by the lord of the manor of which the lands were parcel, the proceedings in which are now pending, or upon a writ of deceit, which at any time after the passing of this act may be brought by the lord of the said manor, be reversed as to any person except the lord of the said manor; and the court shall order such recovery to be vacated only as to the lord of the said manor; and every such recovery which may be reversed as to the lord of the said manor upon such writ of deceit as aforesaid, shall still remain as good and valid against and as binding upon the vouchees therein, and all persons claiming under them, as such recovery would have been if the same had not been reversed by such writ of deceit as aforesaid. (*a*)

(*b*) Sections 5, 6. The object of these sections will be sufficiently apparent, by attending to the following observations. Titles to lands of the tenure of ancient demesne are frequently involved in considerable difficulties, in consequence of fines or recoveries having, by mistake, been levied or suffered in the court of Common Pleas. A fine or recovery of lands of this tenure, ought to be levied or suffered in the court of the manor of which the lands are held. As, however, the lands are within the jurisdiction of the courts at Westminster, a fine or recovery in the court of Common Pleas is not void, but only voidable. The consequence of this is, that the lands become frank fee, till the lord, by means of a writ of deceit, reverses the fine or recovery; after the reversal, the lands are restored to the ancient tenure, and the fine or recovery is rendered void, not only as to the lord, but also as to the parties, and all persons claiming un-

3 & 4 W. 4, c. 74.

Fines and recoveries of lands in ancient demesne levied or suffered in the manor court, after other fines and recoveries in a superior court, shall be as valid as if the tenure

V. And be it further enacted, That if, at any time before or after the passing of this act, a fine or common recovery shall have been levied or suffered, or shall be levied or suffered in a superior court, of lands of the tenure of ancient demesne, and, subsequently to the levying or suffering thereof, a fine or common recovery shall have been or shall be levied or suffered of the same lands in the court of the lord of the manor of which the lands had been previously parcel, and the fine or common recovery levied or suffered in such superior court shall not have been reversed previously to the levying of the fine or the suffering of the common recovery in the lord's court, then, and in every such

der them. Till the reversal, the parties are absolutely bound by the fine or recovery, and there is no method by which the lord can be compelled to bring his writ of deceit, and, according to the prevailing opinion, there is no limit to his right to bring it; and the parties themselves, however so disposed, cannot rectify the error. Although a release from the parties would be effectual to extinguish their rights, yet, according to the better opinion, no subsequent fine or recovery can be levied or suffered in the lord's court, nor can the tenant claim any protection from the lord, or any right depending on the tenure, till the reversal of the fine or recovery in the court of Common Pleas, nor can the tenant have any effectual dealing with the lands as frank fee, till the lord has released his seignory. Therefore, till the reversal of the fine or recovery, or the release of the seignory, the title is unmarketable. The principles of justice require that a fine or recovery in the court of Common Pleas of lands in ancient demesne, should, when reversed by the lord, still remain good against all persons except him. Another mischief arising from the conversion into frank fee of lands of the tenure of ancient demesne, by levying a fine or suffering a recovery in the superior court is, that the owner, not being aware of the effect produced by such fine or recovery, afterwards, and before the same is reversed, levies a fine or suffers a recovery in the lord's court, which, according to the better opinion, is void on the ground of its having been *coram non judice*. Fines and recoveries are not unfrequently levied and suffered in the superior court, not from any wish to defraud the lord of his tenure, but from the circumstance of the legal advisers of parties not knowing that the lands are of the tenure of ancient demesne; for, it often happens, that, previously to a fine or recovery, the title to the lands is not investigated, or there may be nothing appearing on the abstract to shew that the lands were of that tenure. The law in this case is therefore harsh and inconvenient. A fine or recovery levied or suffered in the court of Common Pleas, of lands in Wales, or any county palatine, is absolutely void, and therefore works no mischief. This principle may be a good one as to lands in those jurisdictions, because the boundaries are well known and defined; but, for the reasons above given, it could not be made to apply to lands held in ancient demesne.—1st. Rep. p. 28.

3 & 4 W. 4, c. 74.

case, the fine or common recovery levied or suffered in the lord's court shall, notwithstanding the alteration or change of the tenure by the fine or common recovery previously levied or suffered in the superior court, be as good, valid, and binding as the same would have been if the tenure had not been altered or changed; and that, in every other case where any fine or common recovery shall at any time before the passing of this act have been levied or suffered in a court whose jurisdiction does not extend to the lands of which such fine or recovery shall have been levied or suffered, such fine or recovery shall not be invalid in consequence of its having been levied or suffered in such court, and such court shall be deemed a court of sufficient jurisdiction for all the purposes of such fine or recovery; and, in every other case where persons shall have assumed to hold courts in which fines or common recoveries have been levied or suffered, and such courts shall be unlawful or held without due authority, the fines or common recoveries which at any time before the passing of this act may have been levied or suffered in such unlawful or unauthorized courts shall not be invalid in consequence of their having been levied or suffered therein, and such courts shall be deemed courts of sufficient jurisdiction for all the purposes of such fines or recoveries.

had not been changed.

Fines and recoveries shall not be invalid in other cases, though levied or suffered in courts whose jurisdictions may not extend to the lands therein comprised.

VI. And be it further enacted, That, in every case in which at any time, either before or after the passing of this act, the tenure or* ancient demesne has been or shall be suspended or destroyed by the levying of a fine, or the suffering of a common recovery of lands of that tenure in a superior court, and the lord of the manor of which the lands at the time of levying such fine or suffering such recovery were parcel, shall not reverse the same before the first day of January, one thousand eight hundred and thirty-four, and shall not, by any law in force on the first day of this session of parliament, be barred of his right to reverse the same, such lands, provided, within the last twenty years immediately preceding the first day of January, one thousand eight hundred and thirty-four, the rights of the lord of the manor of which they shall have been parcel, shall in any manner have been acknowledged or recognized as to the same lands, shall, from the said first day of January, one thousand

Tenure of ancient demesne, where suspended or destroyed by fine or recovery in a superior court, restored in cases in which the rights of the lord of the manor shall have been recognized within 20 years.

* *Sic.*

3 & 4 W. 4, c. 74.

eight hundred and thirty-four, again become parcel of the said manor, and be subject to the same heriots, rents, and services as they would have been subject to, if such fine or recovery had not been levied or suffered; and no writ of deceit for the reversal of any fine or common recovery shall be brought after the thirty-first day of December, one thousand eight hundred and thirty-three.

Fines made valid without amendment.

VII. And be it further enacted, That, if it shall be apparent, from the deed declaring the uses of any fine already levied, or hereafter to be levied, that there is in the indentures, record, or any of the proceedings of such fine, any error in the name of the conusor or conusee of such fine, or any misdescription or omission of lands intended to have been passed by such fine, then and in every such case the fine, without any amendment of the indentures, record, or proceedings in which such error, misdescription, or omission shall have occurred, shall be as good and valid as the same would have been, and shall be held to have passed all the lands intended to have been passed thereby, in the same manner as it would have done if there had been no such error, misdescription, or omission.

Recoveries made valid without amendment.

VIII. And be it further enacted, That, if it shall be apparent, from the deed making the tenant to the writ of entry or other writ for suffering a common recovery already suffered or hereafter to be suffered, that there is in the exemplification, record, or any of the proceedings of such recovery, any error in the name of the tenant, demandant, or vouchee in such recovery, or any misdescription or omission of lands intended to have been passed by such recovery, then and in every such case the recovery, without any amendment of the exemplification, record, or proceedings in which such error, misdescription, or omission shall have occurred, shall be as good and valid as the same would have been, and shall be held to have passed all the lands intended to have been passed thereby, in the same manner as it would have done if there had been no such error, misdescription, or omission.

Saving jurisdiction in cases not provided for.

IX. Provided always, and be it further enacted, That nothing in this act contained shall lessen or take away the jurisdiction of any court to amend any fine or common re-

covery, or any proceeding therein, in cases not provided for by this act. 3 & 4 W. 4, c. 74.

X. And be it further enacted, That no common recovery already suffered, or hereafter to be suffered, shall be invalid in consequence of the neglect to inrol in due time a bargain and sale purporting to make the tenant to the writ of entry or other writ for suffering such recovery, provided such recovery would have been valid if the bargain and sale purporting to make the tenant to the writ had been duly inrolled. Recoveries made valid in certain cases where bargain and sale is not duly inrolled.

XI. And be it further enacted, That no common recovery already suffered, or hereafter to be suffered, shall be invalid, in consequence of any person in whom an estate at law was outstanding having omitted to make the tenant to the writ of entry or other writ for suffering such recovery, provided the person who was the owner of, or had power to dispose of an estate in possession, not being less than an estate for a life or lives, in the whole of the rents and profits of the lands in which such estate at law was outstanding, or the ultimate surplus of such rents and profits, after payment of any charges thereout, and whether any surplus after payment of such charges shall actually remain or not, shall, within the time limited for making the tenant to the writ for suffering such recovery, have conveyed or disposed of such estate in possession to the tenant to such writ; and an estate shall be deemed to be an estate in possession, notwithstanding there shall be subsisting prior thereto any lease for lives or years, absolute or determinable, upon which a rent is reserved, or any term of years upon which no rent is reserved. Recoveries invalid in consequence of there not being proper tenants to the writs of entry, made valid in certain cases.

XII. Provided always, and be it further enacted, That where any fine or common recovery shall before the passing of this act have been wholly reversed, such fine or recovery shall not be rendered valid by this act; and, where any fine or common recovery shall before the passing of this act have been reversed as to some only of the parties thereto, or as to some only of the lands therein comprised, such fine or recovery shall not be rendered valid by this act so far as the same shall have been reversed; and, where any person who would have been barred by any fine or common re- Certain cases in which fines and recoveries shall not be made valid by this act.

3 & 4 W. 4, c. 74.

covery if valid, shall before the passing of this act have had any dealings with the lands comprised in such fine or recovery on the faith of the same being invalid, such fine or recovery shall not be rendered valid by this act; and this act shall not render valid any fine or common recovery as to lands of which any person shall at the time of the passing of this act be in possession in respect of any estate which the fine or common recovery, if valid, would have barred, nor any fine or common recovery which, before the passing of this act, any court of competent jurisdiction shall have refused to amend; nor shall this act prejudice or affect any proceedings at law or in equity, pending at the time of the passing of this act, in which the validity of such fine or recovery shall be in question between the party claiming under such fine or recovery and the party claiming adversely thereto; and such fine or recovery, if the result of such proceedings shall be to invalidate the same, shall not be rendered valid by this act; and, if such proceedings shall abate or become defective in consequence of the death of the party claiming under or adversely to such fine or recovery, any person who but for this act would have a right of action or suit by reason of the invalidity of such fine or recovery, shall retain such right, so that he commence proceedings within six calendar months after the death of such party.

As to the records of fines and recoveries in the courts of Common Pleas at Westminster and Lancaster, and the court of Pleas at Durham, after the 31st of Dec. 1833.

XIII. And be it further enacted, That, after the thirty-first day of December, one thousand eight hundred and thirty-three, the records of all fines and common recoveries levied and suffered in his Majesty's court of Common Pleas at Westminster, and all the proceedings thereof, shall be deposited in such places, and kept by such persons as the said court of Common Pleas shall from time to time order or direct; and the records of all fines and common recoveries levied and suffered in his Majesty's court of Common Pleas at Lancaster, and all the proceedings thereof, shall be deposited in such places, and kept by such persons as his Majesty's justices of assize for the county palatine of Lancaster for the time being, shall from time to time order or direct; and the records of all fines and common recoveries levied and suffered in the court of Pleas of the

county palatine of Durham, and all the proceedings thereof, shall be deposited in such places, and kept by such persons as the said court of Pleas shall from time to time order or direct; and in the meantime the said records and proceedings shall remain in the same places respectively where they are now deposited, and be kept by the respective persons who would have continued entitled to the custody thereof if this act had not been passed; and, while the said records and proceedings respectively shall be kept by such persons respectively, searches may be made, and extracts and copies obtained as heretofore, and on paying the accustomed fees; and, when any of the records and proceedings shall, by the order of the court or justices having the control over the same, be kept by any other person, then, so far as relates to the records and proceedings in the custody of such other person, searches may be made, and extracts or copies obtained, at such times, and on paying such fees, as shall from time to time be ordered by the court or justices having the control over the same; and the extracts or copies so obtained shall be as available in evidence as they would have been if obtained from the person whose duty it would have been to have made and delivered out the same if this act had not been passed. 3 & 4 W. 4, c. 74.

Estates tail and estates expectant thereon, no longer barrable by warranty.

XIV. And be it further enacted, That all warranties of lands which, after the thirty-first day of December, one thousand eight hundred and thirty-three, shall be made or entered into by any tenant in tail thereof, shall be absolutely void against the issue in tail, and all persons whose estates are to take effect after the determination or in defeasance of the estate tail. (*b*)

(*b*) As warranty, though applicable in some cases to the barring of entails, is ill adapted to the purpose, and out of use, we recommend that it should be abolished so far as it applies to estates tail, and that in future there should be only one mode of barring them, (1st Rep. 30). On this subject, the late Professor Park, in answer to one of the questions issued by the commissioners, makes the following observations. "It has always appeared to me a great absurdity, that any part of the doctrine of the bar by warranty to the issue in tail, remainder-man, or reversioner, should still incumber the law of England, as that mode of barring is not resorted to as a practice of conveyancing, and can only be casual in its effect; while the law applicable to it is obscure and abstruse in the highest degree, and is probably not understood by half-a-dozen per-

3 & 4 W. 4, c. 74.

Power, after the 31st of Dec. 1833, to dispose of lands entailed in fee simple or for a less estate, saving the rights of certain persons.

XV. And be it further enacted, That, after the thirty-first day of December, one thousand eight hundred and thirty-three, every actual tenant in tail, whether in possession, remainder, contingency, or otherwise, shall have full power to dispose of, for an estate in fee simple absolute, or for any less estate, the lands entailed, as against all persons claiming the lands entailed by force of any estate tail which shall be vested in or might be claimed by, or which, but for some previous act would have been vested in, or might have been claimed by, the person making the disposition, at the time of his making the same, and also as against all persons, including the King's most Excellent Majesty, his heirs and successors, whose estates are to take effect after the determination, or in defeasance of any such estate tail; saving always the rights of all persons in respect of estates prior to the estate tail in respect of which such disposition shall be made, and the rights of all other persons except those against whom such disposition is by this act authorized to be made.

Power of disposition not to be exercised by women tenants in tail ex provisione viri, under 11 H. 7, c. 20, except with assent.

XVI. Provided always, and be it further enacted, That where, under any settlement made before the passing of this act, any woman shall be tenant in tail of lands within the provisions of an act passed in the eleventh year of the reign of His Majesty King Henry the Seventh, intituled "Certain alienations made by the wife of the lands of her deceased husband shall be void," the power of disposition herein-before contained as to such lands, shall not be exer-

sons in the profession. The celebrated case of *Bole* v. *Horton* (Vaugh. 363) divided the court in the days of Chief Justice Vaughan, and the point has never been decided to this day; viz. whether the warranty collateral of tenant in tail, descending upon the heir of the donor, shall bar the reversion. In a formedon case, in which I was concerned in the year 1826, that was the sole point; and the case being of some anxiety, I prepared an argument at great length in support of the rebutter, for the use of the gentlemen who held the defendant's briefs on the demurrer. But, when the cause came on, as I understood, no one seemed to know what to do with it, and a compromise was set up: but I never see that argument without feeling regret that such a mass of obsolete nonsense should still remain part of the law of England, still liable to be raked up, to bewilder bar and bench, and convert courts of law into forums for the discussion of forgotten antiquarianism; as they were within our recent recollection about to be converted into arenæ for the exhibition of Gothic prize fighting. (ibid p. 169.)

cised by her, except with such assent as, if this act had not been passed, would, under the provisions of the said act of King Henry the Seventh, have rendered valid a fine or common recovery levied or suffered by her of such lands. (*c*) 3 & 4 W. 4, c. 74.

XVII. Provided always, and be it further enacted, That, except as to lands comprised in any settlement made before the passing of this act, the said act of the eleventh year of the reign of his Majesty King Henry the Seventh, shall be, and the same is hereby repealed. (*c*) Except, &c. 11 H. 7, c. 20 repealed.

XVIII. Provided always, and be it further enacted (*d*), That the power of disposition herein-before contained shall not extend to tenants of estates tail, who, by an act passed in the thirty-fourth and thirty-fifth years of the reign of his Majesty King Henry the Eighth, intituled "An act to embar feigned recovery of lands wherein the King is in reversion," or by any other act, are restrained from barring their estates tail, or to tenants in tail after possibility of issue extinct. The power of disposition not to extend to certain tenants in tail.

XIX. And be it further enacted (*e*), That, after the Power, after

(*c*) A woman having an estate in dower, or for her life, or in tail jointly with her husband, or only to herself or to her use, in any lands of the inheritance or purchase of her husband, or given to her husband and her in tail or for life by any of the ancestors of the husband, is prohibited by the 11 Hen. 7, c. 20, from discontinuing or suffering a recovery after the death of her husband, unless with the assent recorded or inrolled of the heirs next inheritable to her, or of him or them that next after her death should have an estate of inheritance in the same lands. This statute, as to fines, is confirmed by the 32 Hen. 8, c. 36, s. 2. Upon this the commissioners observe, that the statute 11 Hen. 7, c. 20, has been held not to extend to copyholds; many questions have arisen upon it. As it has nearly become obsolete, and as there does not appear to us to be any solid reason why an estate tail given to a woman by her husband, or any of his ancestors, should be put on a different footing from other estates tail, we submit that it will be expedient to discontinue the present restraint, we recommend that tenants in tail *ex provisione viri*, should have the power of barring their estates tail.

(*d*) We propose, that the substitute should not extend to tenants in tail after possibility of issue extinct, nor to tenants in tail who are now prohibited by the 34 & 35 Hen. 8, c. 8, or by any other statute, from barring their entails, as we do not feel ourselves authorized to recommend any alteration in the law in this respect.—1st Rep. 37.

(*e*) The power, which a tenant in tail in remainder has of acquiring a base fee by means of a fine, is open to the objection that it enables an extravagant youth to anticipate his expectations upon very disadvantageous terms, and is open to the still more serious objection, that the estate may be palmed upon an innocent purchaser

3 & 4 W. 4, c. 74.

thirty-first day of December, one thousand eight hundred and thirty-three, in every case in which an estate tail in any lands shall have been barred and converted into a base fee, either before or on or after that day, the person who, if such estate tail had not been barred, would have been actual tenant in tail of the same lands, shall have full power to dispose of such lands as against all persons, including the King's most Excellent Majesty, his heirs and successors, whose estates are to take effect after the determination or in defeasance of the base fee into which the estate tail shall have been converted, so as to enlarge the base fee into a fee simple absolute; saving always the rights of all persons, in respect of estates prior to the estate tail which shall have been converted into a base fee, and the rights of all other persons, except those against whom such disposition is by this act authorized to be made.

the 31st of Dec. 1833, to enlarge base fees; saving the rights of certain persons.

XX. Provided always, and be it further enacted, That nothing in this act contained shall enable any person to dispose of any lands entailed in respect of any expectant interest which he may have as issue inheritable to any estate tail therein.

Issue inheritable not to bar expectancies.

as an estate in fee simple, its origin being in course of time lost sight of; and at last the issue in tail may fail, and the remainder-man may at a remote period recover the estate. This last objection will be removed if the alterations proposed by us in that part of our report which relates to the limitations of actions are adopted. On the other hand, there are cases in which this power has operated beneficially; it has afforded support to a tenant in tail in remainder, where he has had to deal with a tenant for life who was rapacious, or who refused altogether to concur in barring the entail, and a tenant in tail in remainder, having the means of making a provision for himself, though an imperfect one, has often made a better bargain with the tenant for life, than he could otherwise have done. We, therefore, under all the circumstances, consider it advisable to allow a tenant in tail, where there is a prior beneficial owner, without the concurrence of that owner, to bar his estate tail, and acquire a base fee in the same manner as a tenant in tail in remainder can now do by means of a fine. This will render it necessary to give the tenant in tail, after he has acquired a base fee, a power, by means of the substitute for fines and recoveries, to make a disposition for expanding the base fee into a fee simple, as he can now do under the existing law by means of a recovery. It will also be necessary to make the like provision for expanding base fees, existing at the time when fines and recoveries are abolished. — 1st Rep. 33.

3 & 4 W. 4, c. 74.

Extent of the estate created by a tenant in tail by way of mortgage, or for any other limited purpose.

XXI. Provided always, and be it further enacted, That, if a tenant in tail of lands shall make a disposition of the same, under this act, by way of mortgage, or for any other limited purpose, then, and in such case, such disposition shall, to the extent of the estate thereby created, be an absolute bar in equity, as well as at law, to all persons as against whom such disposition is by this act authorized to be made, notwithstanding any intention to the contrary may be expressed or implied in the deed by which the disposition may be effected. Provided always, that, if the estate created by such disposition shall be only an estate *per autre vie*, or for years, absolute or determinable; or if, by a disposition under this act by a tenant in tail of lands, an interest, charge, lien, or incumbrance, shall be created without a term of years, absolute or determinable, or any greater estate, for securing or raising the same, then such disposition shall, in equity, be a bar only so far as may be necessary to give full effect to the mortgage, or to such other limited purpose, or to such interest, lien, charge, or incumbrance, notwithstanding any intention to the contrary may be expressed or implied in the deed by which the disposition may be effected.

The owner of the first existing estate under a settlement, prior to an estate tail under the same settlement, to be the protector of the settlement.

XXII. And be it further enacted, (*h*) That, if at the time

(*h*) Sections 22—54. The object of this long series of enactments respecting the protector of the settlement, cannot, probably, be more satisfactorily explained than in the language of the commissioners.

"We propose as the substitute, in every case except that of lands held by copy of court-roll, a common conveyance, which, for the reasons hereafter stated, we think, should be inrolled. And we propose, that, by the substitute, a tenant in tail of lands not held by copy of court-roll, should have full power as against the issue in tail, and all persons claiming any estate or interest in remainder, expectant upon, or in derogation of the estate tail, to dispose of the lands entailed as if he were tenant in fee-simple. It would be too broad a principle to establish, that a tenant in tail, whether in possession or in remainder, should be enabled to bar the entail and the remainders over, without any restriction; and the giving him such an unrestricted power in all cases might be productive of serious evils, by rendering family settlements abortive. Although the rule requiring the concurrence of the person who has the freehold to make the tenant to the *præcipe* in a recovery, is purely technical, and is liable to many objections, as we have already stated, yet great benefits, which could not originally have been contemplated, when recoveries were first applied to the barring of entails, have resulted from it. It has given parents who, in family settlements, usually have the first estate of freehold, the means of checking

3 & 4 W. 4, c. 74.

when there shall be a tenant in tail of lands under a settlement, there shall be subsisting in the same lands, or any of

any improvident dealings with the property by their children; it has given rise to family arrangements, which are usually entered into as soon as the first tenant in tail comes of age, and which generally terminate in a re-settlement of the property, and in continuing it in the family for another generation, and in an immediate provision for the first tenant in tail, and in giving him powers to provide for a wife and children, in the lifetime of his father; and it has prevented the intention of the original settlor from being defeated, at the will and caprice of a tenant in tail, who may possibly never come into possession. To avoid the evils which have resulted from this rule, and at the same time to preserve the benefits, we recommend that the concurrence of the person having the immediate estate of freehold, should, as seised of that estate, be no longer necessary to enable a tenant in tail to bar the entail and the remainders over, and that, instead of such concurrence, where, by the deed or will creating the entail intended to be barred, or by any appointment made in exercise of a power contained therein, a beneficial estate, either for life, or years determinable on life, or of any greater extent, not being a lease on which a rent shall be reserved, shall be limited prior to the estate tail intended to be barred, and shall be subsisting, or where the first beneficial estate shall have devolved upon some person as tenant by the courtesy, either at law or in equity, in respect of the estate tail intended to be barred, or of any other estate tail created by the same deed or will, any disposition by the tenant in tail shall be made with the concurrence of the person to whom such prior estate, or the first of such prior estates, if more than one, shall have been limited, or of the person upon whom such prior estate shall have devolved; and that any disposition made without such concurrence, shall only bar the estate tail; and that the concurrence of such beneficial owner shall be equally good and available, notwithstanding he may have incumbered or aliened his estate, or may have become bankrupt or insolvent; and that the concurrence of the first beneficial owner may be signified either by his being a party to the substitute or by a separate deed, and without obtaining from him an actual conveyance of his estate. If the concurrence should be signified by a separate deed, we think it advisable that it should not be allowed to the concurring party to impose any terms on the tenant in tail, as the necessity of seeing whether he had complied with those terms would then be avoided. This will not prevent the parent or other beneficial owner from requiring the estate to be settled in a reasonable manner, for the benefit of the family, as he will always have it in his power to do this by keeping back the deed of concurrence until he is satisfied that the estate has been settled in such manner as he has required. If the first beneficial owner should be a married woman, we recommend that her husband should also be a concurring party; and that, as she will part with no estate, her concurrence should be given without a separate examination, and as if she were a feme sole. The deviation from the present rule will not be so great as may at first sight appear; for, in the majority of cases, the tenant of the immediate estate of freehold, and the first beneficial owner, will be the same person. We have not thought it advisable to require the concurrence of the tenant in dower, for it seldom, if ever, happens that dower is set out by metes and bounds;

them, under the same settlement, any estate for years, determinable on the dropping of a life or lives, or any greater estate (not being an estate for years), prior to the estate tail, then the person who shall be the owner of the prior estate, or the first of such prior estates, if more than one, then subsisting under the same settlement, or who would have been so if no absolute disposition thereof had been made (the first of such prior estates, if more than one, being, for all the purposes of this act, deemed the prior estate), shall be the protector of the settlement, so far as regards the lands in which such prior estate shall be subsisting, and shall, for all the purposes of this act, be deemed the owner of such prior estate, although the same may have been charged or incumbered, either by the owner thereof or by the settlor, or otherwise howsoever, and although the whole of the rents and profits be exhausted, or required for the payment of the charges and incumbrances on such prior estate, and although such prior estate may have been absolutely disposed of by the owner thereof, or by or in consequence of the bankruptcy or insolvency of such owner, or by any other act or default of such owner; and that an estate by the curtesy, in respect of the estate tail, or of any prior estate created by the same settlement, shall be deemed a prior estate under the same settlement, within the meaning of this clause; and that an estate by way of resulting use or trust to or for the settlor, shall be deemed an estate under the same settlement, within the meaning of this clause. 3 & 4 W. 4, c. 74.

XXIII. Provided always, and be it further enacted, That, where two or more persons shall be owners, under a settlement within the meaning of this act, of a prior estate, the sole owner of which estate, if there had been only one, would, in respect thereof, have been the protector of such settlement, each of such persons, in respect of such undivided share as he could dispose of, shall, for all the purposes of this act, be deemed the owner of a prior estate, and shall, in exclusion of the other or others of them, be Each of two or more owners of a prior estate to be the sole protector as to his share.

and, if such an estate does occur, her concurrence would have only a partial operation, as the estate is confined to a part of the lands entailed."—1st Rep. 31.

3 & 4 W. 4, c. 74

the sole protector of such settlement, to the extent of such undivided share.

Where a married woman alone shall be the protector, and where she and her husband together shall be protector.

XXIV. Provided always, and be it further enacted, That, where a married woman would, if single, be the the protector of a settlement in respect of a prior estate, which is not thereby settled or agreed or directed to be settled to her separate use, she and her husband together shall, in respect of such estate, be the protector of such settlement, and shall be deemed one owner; but, if such prior estate shall by such settlement have been settled or agreed or directed to be settled to her separate use, then, and in such case, she alone shall, in respect of such estate, be the protector of such settlement.

As to estates confirmed or restored by settlement.

XXV. Provided always, and be it further enacted, That, except in the case of a lease hereinafter provided for, where an estate shall be limited by a settlement, by way of confirmation, or where the settlement shall merely have the effect of restoring an estate: in either of those cases, such estates shall, for the purposes of this act, so far as regards the protector of the settlement, be deemed an estate subsisting under such settlement.

As to leases at rent created by settlement.

XXVI. Provided always, and be it further enacted, That, where a lease at a rent shall be created or confirmed by a settlement, the person in whose favour such lease shall be created or confirmed, shall not, in respect thereof, be the protector of such settlement.

No tenant in dower, heir, executor, &c. to be protector, except in the case of a bare trustee.

XXVII. Provided always, and be it further enacted, That no woman in respect of her dower, and (except in the case hereinafter provided for, of a bare trustee under a settlement made on or before the thirty-first day of December, one thousand eight hundred and thirty-three) no bare trustee, heir, executor, administrator, or assign, in respect of any estate taken by him as such bare trustee, heir, executor, administrator, or assign, shall be the protector of a settlement.

Who shall be the protector where the owner of the prior estate shall, by the two last clauses, be excluded.

XXVIII. Provided always, and be it further enacted, That where, under any settlement, there shall be more than one estate prior to an estate tail, and the person who shall be the owner, within the meaning of this act, of any such prior estate, in respect of which, but for the two last pre-

ceding clauses, or either of them, he would have been the protector of the settlement, shall, by virtue of such clauses, or either of them, be excluded from being the protector; then and such case the person (if any) who, if such estate did not exist, would be the protector of the settlement, shall be such protector.

Where, in the disposition of an estate before the 31st Dec. 1833, the person to make the tenant to the writ of entry in a recovery shall be the protector.

XXIX. Provided always, and be it further enacted, That, where already, or on or before the thirty-first day of December, one thousand eight hundred and thirty-three, an estate under a settlement shall have been disposed of, either absolutely or otherwise, and either for valuable consideration or not, the person who in respect of such estate would, if this act had not been passed, have been the proper person to have made the tenant to the writ of entry or other writ for suffering a common recovery of the lands entailed by such settlement, shall, during the continuance of the estate which conferred the right to make the tenant to such writ of entry or other writ, be the protector of such settlement.

Where, in the case of the disposition of a reversion on or before the 31st of Dec. 1833, the person to make the tenant to the writ of entry in a recovery shall be the protector.

XXX. Provided always, and be it further enacted, That, where any person having, either already, or on or before the thirty-first day of December, one thousand eight hundred and thirty-three, either for valuable consideration or not, disposed of, either absolutely or otherwise, a remainder or reversion in fee in any lands, or created any estate out of such remainder or reversion, would, under this act, if this clause had not been inserted, have been the protector of the settlement by which the lands were entailed in which such remainder or reversion may be subsisting, and thereby be enabled to concur in the barring of such remainder or reversion, which he could not have done if he had not become such protector; then, and in every such case, the person who, if this act had not been passed, would have been the proper person to have made the tenant to the writ of entry or other writ for suffering a common recovery of such lands, shall, during the continuance of the estate which conferred the right to make the tenant to such writ of entry or other writ, be the protector of such settlement.

Where a bare trustee, under a settlement

XXXI. Provided always, and be it further enacted, That where, under any settlement of lands made before the passing of this act, the person who, if this act had not

3 & 4 W. 4, c. 74.

made before the passing of this act, shall be the protector.

been passed, would have been the proper person to make the tenant to the writ of entry or other writ for suffering a common recovery of such lands, for the purpose of barring any estate tail or other estate under such settlement, shall be a bare trustee, such trustee shall, during the continuance of the estate conferring on him the right to make the tenant to such writ of entry or other writ, be the protector of such settlement.

Power to any settlor to appoint the protector.

XXXII. Provided always, and be it further enacted, That it shall be lawful for any settlor entailing lands to appoint, by the settlement by which the lands shall be entailed, any number of persons in esse, not exceeding three, and not being aliens, to be protector of the settlement, in lieu of the person who would have been the protector if this clause had not been inserted, and either for the whole or any part of the period for which such person might have continued protector; and, by means of a power to be inserted in such settlement, to perpetuate, during the whole or any part of such period, the protectorship of the settlement in any one person or number of persons in esse, and not being an alien or aliens, whom the donee of the power shall think proper, by deed, to appoint protector of the settlement, in the place of any one person, or number of persons, who shall die, or shall by deed relinquish his or their office of protector; and the person or persons so appointed shall, in case of there being no other person then protector of the settlement, be the protector, and shall, in case of there being any other person then protector of the settlement, be protector jointly with such other person: Provided nevertheless, that, by virtue or means of any such appointment, the number of the persons to compose the protector shall never exceed three: Provided further, nevertheless, that every deed by which a protector shall be appointed under a power in a settlement, and every deed by which a protector shall relinquish his office, shall be void unless inrolled in his Majesty's high court of Chancery within six calendar months after the execution thereof: Provided further, nevertheless, that the person who, but for this clause, would have been sole protector of the settlement, may be one of the persons to be appointed pro-

tector under this clause, if the settlor shall think fit, and shall, unless otherwise directed by the settlor, act as sole protector, if the other persons constituting the protector shall have ceased to be so by death or relinquishment of the office by deed, and no other person shall have been appointed in their place.

In cases of lunacy, the Lord Chancellor or Lord Keeper, or Lords Commissioners, or other persons intrusted with lunatics, or, in cases of treason or felony, &c. the court of Chancery, to be the protector.

XXXIII. Provided always, and be it further enacted, That, if any person, protector of a settlement, shall be lunatic, idiot, or of unsound mind, and whether he shall have been found such by inquisition or not, then the Lord High Chancellor of Great Britain, or the Lord Keeper, or the Lords Commissioners for the custody of the great seal of Great Britain, for the time being, or other the person or persons for the time being intrusted by the King's sign manual, with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot, and of unsound mind, shall be the protector of such settlement, in lieu of the person who shall be such lunatic or idiot, or of unsound mind, as aforesaid; or, if any person, protector of a settlement, shall be convicted of treason or felony; or, if any person, not being the owner of a prior estate under a settlement, shall be protector of such settlement, and shall be an infant; or, if it shall be uncertain whether such last-mentioned person be living or dead; then his Majesty's high court of Chancery shall be the protector of such settlement, in lieu of the person who shall be an infant, or whose existence cannot be ascertained as aforesaid: or, if any settlor entailing lands, shall, in the settlement by which the lands shall be entailed, declare that the person who, as owner of a prior estate under such settlement, would be entitled to be protector of the settlement, shall not be such protector, and shall not appoint any person to be protector in his stead; then the said court of Chancery shall, as to the lands in which such prior estate shall be subsisting, be the protector of the settlement during the continuance of such estate: or if, in any other case where there shall be subsisting under a settlement an estate prior to an estate tail under the same settlement, and such prior estate shall be sufficient to qualify the owner thereof to be protector of the settlement, and there shall happen at any time to be no

3 & 4 W. 3, c. 74.

protector of the settlement as to the lands in which the prior estate shall be subsisting, the said court of Chancery shall, while there shall be no such protector, and the prior estate shall be subsisting, be the protector of the settlement as to such lands.

Where there is a protector, his consent requisite to enable an actual tenant in tail to create a larger estate than a base fee.

XXXIV. Provided always, and be it further enacted, that if, at the time when any person, actual tenant in tail of lands under a settlement, but not entitled to the remainder or reversion in fee immediately expectant on the determination of his estate tail, shall be desirous of making under this act a disposition of the lands entailed, there shall be a protector of such settlement, then and in every such case the consent of such protector shall be requisite to enable such actual tenant in tail to dispose of the lands entailed to the full extent to which he is herein-before authorized to dispose of the same; but such actual tenant in tail may, without such consent, make a disposition under this act of the lands entailed, which shall be good against all persons who, by force of any estate tail which shall be vested in or might be claimed by, or which but for some previous act or default would have been vested in or might have been claimed by, the person making the disposition at the time of his making the same, shall claim the lands entailed.

Where a base fee, and a protector, his consent requisite to the exercising of a power of disposition.

XXXV. Provided always, and be it further enacted, that, where an estate tail shall have been converted into a base fee, in such case, so long as there shall be a protector of the settlement by which the estate tail was created, the consent of such protector shall be requisite to enable the person who would have been tenant of the estate tail if the same had not been barred, to exercise, as to the lands in respect of which there shall be such protector, the power of disposition herein-before contained.

The protector to be subject to no control in the exercise of his power of consenting.

XXXVI. And be it further enacted, that any device, shift, or contrivance by which it shall be attempted to control the protector of a settlement in giving his consent, or to prevent him in any way from using his absolute discretion in regard to his consent, and also any agreement entered into by the protector of a settlement to withhold his consent, shall be void; and that the protector of a settle-

ment shall not be deemed to be a trustee in respect of his power of consent; and a court of equity shall not control or interfere to restrain the exercise of his power of consent, nor treat his giving consent as a breach of trust.

Certain rules of equity not to apply between the protector and a tenant in tail under the same.

XXXVII. Provided always, and be it further enacted, That the rules of equity in relation to dealings and transactions between the donee of a power and any object of the power in whose favour the same may be exercised, shall not be held to apply to dealings and transactions between the protector of a settlement and a tenant in tail under the same settlement, upon the occasion of the protector giving his consent to a disposition by a tenant in tail under this act.

A voidable estate by a tenant in tail, in favour of a purchaser, confirmed by a subsequent disposition of such tenant in tail under this act, but not against a purchaser without notice.

XXXVIII. Provided always, and be it further enacted, That, when a tenant in tail of lands under a settlement shall have already created or shall hereafter create in such lands, or any of them, a voidable estate in favour of a purchaser for valuable consideration, and shall afterwards under this act, by any assurance other than a lease not requiring inrolment, made a disposition of the lands in which such voidable estate shall be created, or any of them, such disposition whatever its object may be, and whatever may be the extent of the estate intended to be thereby created, shall, if made by the tenant in tail with the consent of the protector (if any) of the settlement, or by the tenant in tail alone, if there shall be no such protector, have the effect of confirming such voidable estate in the lands thereby disposed of to its full extent as against all persons except those whose rights are saved by this act; but if, at the time of making the disposition, there shall be a protector of the settlement, and such protector shall not consent to the disposition, and the tenant in tail shall not without such consent be capable under this act of confirming the voidable estate to its full extent, then and in such case such disposition shall have the effect of confirming such voidable estate so far as such tenant in tail would then be capable under this act of confirming the same without such consent: provided always, that, if such disposition shall be made to a purchaser for valuable consideration, who shall not have express notice of the voidable estate, then and in such case

3 & 4 W. 4, c. 74.

the voidable estate shall not be confirmed as against such purchaser and the persons claiming under him.

Base fees, when united with the immediate reversions, enlarged instead of being merged.

XXXIX. And be it further enacted (*i*), That, if a base fee in any lands, and the remainder or reversion in fee in the same lands, shall, at the time of the passing of this act, or at any time afterwards, be united in the same person, and at any time after the passing of this act there shall be no intermediate estate between the base fee and the remainder or reversion, then and in such case the base fee shall not merge, but shall be ipso facto enlarged into as large an estate as the tenant in tail, with the consent of the protector, if any, might have created by any disposition under this act if such remainder or reversion had been vested in any other person.

Tenant in tail to make a disposition by deed as

XL. And be it further enacted, That every disposition of lands under this act by a tenant in tail thereof shall be effected by some one of the assurances (not being a will) by

(*i*) If a tenant in tail, claiming the immediate remainder or reversion in fee, bars his estate tail by means of a fine instead of a recovery, he frequently prejudices his title by merging in the remainder or reversion the base fee acquired by the fine, as he thereby not only lets in all the charges and estates made and created by the persons through whom he derived the remainder or reversion, but also renders it necessary afterwards to make out his title to the remainder or reversion, which, in many instances, is attended with great difficulty and expense. These mischiefs are, in the case of a tenant in tail in possession, produced by unskilful practitioners, from want of due attention to the different effects of a fine and recovery; the recovery expanding the estate tail and converting it into a fee simple, (1st Rep. p. 28). The commissioners therefore recommended that the substitute for fines and recoveries should in every case (except that of a tenant in tail with the immediate remainder or reversion to himself in fee, who, where there may be a prior beneficial owner, may happen to avail himself of it without his concurrence,) have the effect of not letting in the charges and estates created by any person claiming any estate or interest to take effect on the determination or in derogation of the estate tail to be barred, or of the base fee, if the same should have been previously acquired; and that it should in this respect have precisely the same operation as a recovery. In the excepted case the substitute would produce the same effect as a fine levied by a tenant in tail in remainder with the immediate remainder or reversion to himself in fee, and would, in accordance with the law as it existed before this act, let in all charges and estates affecting this ultimate remainder or reversion. If he should be desirous of preventing this mischief, he must procure the concurrence of the first beneficial owner. It seems proper to add, that by this act, as it now stands, the proposed exception has been abandoned, and that in all cases the base fee will be expanded, so as to exclude incumbrances on the reversion.

which such tenant in tail could have made the disposition if his estate were an estate at law in fee simple absolute: Provided, nevertheless, that no disposition by a tenant in tail shall be of any force, either at law or in equity, under this act, unless made or evidenced by deed; and that no disposition by a tenant in tail resting only in contract, either express or implied, or otherwise, and whether supported by a valuable or meritorious consideration or not, shall be of any force at law or in equity under this act, notwithstanding such disposition shall be made or evidenced by deed; and, if the tenant in tail making the disposition shall be a married woman, the concurrence of her husband shall be necessary to give effect to the same; and any deed which may be executed by her for effecting the disposition shall be acknowledged by her as herein-after directed.

3 & 4 W. 4, c. 74.

if seised in fee, but not by will or contract; and, if a married woman, with her husband's concurrence.

XLI. Provided always, and be it further enacted, That no assurance by which any disposition of lands shall be effected under this act by a tenant in tail thereof (except a lease for any term not exceeding twenty-one years, to commence from the date of such lease, or from any time not exceeding twelve calendar months from the date of such lease, where a rent shall be thereby reserved, which, at the time of granting such a lease, shall be a rack rent, or not less than five sixth parts of a rack rent,) shall have any operation under this act unless it be inrolled in his Majesty's high court of Chancery, within six calendar months after the execution thereof; and, if the assurance by which any disposition of lands shall be effected under this act shall be a bargain and sale, such assurance, although not inrolled within the time prescribed by the act passed in the twenty-seventh year of the reign of his Majesty King Henry the Eighth, intituled, "For Inrollment of Bargains and Sales," shall, if inrolled in the said court of Chancery within the time prescribed by this clause, be as good and valid as the same would have been if the same had been inrolled in the said court within the time prescribed by the said act of Henry the Eighth.

Every assurance by a tenant in tail, except a lease not exceeding 21 years at a rack rent, or not less than five sixths of a rack rent, to be inoperative unless inrolled in Chancery within six months.

28 H. 8, c. 16.

XLII. And be it further enacted, that the consent of the protector of a settlement to the disposition under this act of a tenant in tail, shall be given either by the same assur-

Consent of protector by the same or a distinct deed.

3 & 4 W. 4, c. 74.

ance by which the disposition shall be effected, or by a deed distinct from the assurance, and to be executed either on or at any time before the day on which the assurance shall be made, otherwise the consent shall be void.

If by distinct deed.

XLIII. And be it further enacted, That, if the protector of a settlement shall, by a distinct deed, give his consent to the disposition of a tenant in tail, it shall be considered that such protector has given an absolute and unqualified consent, unless in such deed he shall refer to the particular assurance by which the disposition shall be effected, and shall confine his consent to the disposition thereby made.

Protector not to revoke his consent.

XLIV. And be it further enacted, That it shall not be lawful for the protector of a settlement, who, under this act, shall have given his consent to the disposition of a tenant in tail, to revoke such consent.

A married woman protector.

XLV. And be it further enacted, That any married woman, being, either alone or jointly with her husband, protector of a settlement, may, under this act, in the same manner as if she were a feme sole, give her consent to the disposition of a tenant in tail.

Consent by distinct deed void, unless inrolled with or before assurance.

XLVI. Provided always, and be it further enacted, That the consent of a protector to the disposition of a tenant in tail shall, if given by a deed distinct from the assurance by which the disposition shall be effected by the tenant in tail, be void, unless such deed be inrolled in his Majesty's high court of Chancery either at or before the time when the assurance shall be inrolled.

Courts of equity excluded from giving any effect to dispositions by tenants in tail, or consents of protectors of settlements, which in courts of law would not be effectual.

XLVII. And be it further enacted, That, in cases of dispositions of lands under this act by tenants in tail thereof, and also in cases of consents by protectors of settlements to dispositions of lands under this act by tenants in tail thereof, the jurisdiction of courts of equity shall be altogether excluded, either on the behalf of a person claiming for a valuable or meritorious consideration, or not, in regard to the specific performance of contracts and the supplying of defects in the execution either of the powers of disposition given by this act to tenants in tail, or of the powers of consent given by this act to protectors of settlements, and the supplying under any circumstances of the want of *execution of* such powers of disposition and consent re-

spectively, and in regard to giving effect in any other manner to any act or deed by a tenant in tail or protector of a settlement, which, in a court of law, would not be an effectual disposition or consent under this act; and that no disposition of lands under this act by a tenant in tail thereof, in equity, and no consent by a protector of a settlement to a disposition of lands under this act, by a tenant in tail thereof, in equity, shall be of any force, unless such disposition or consent would, in case of an estate tail at law, be an effectual disposition or consent under this act in a court of law.

Lord Chancellor, &c. to have power to consent to a disposition by a tenant in tail, and to make such orders as shall be thought necessary; and, if any other person shall be joint protector, the disposition not to be valid without his consent.

XLVIII. Provided always, and be it further enacted, That, in every case in which the Lord High Chancellor, Lord Keeper, or Lords Commissioners for the custody of the great seal, or other the person or persons intrusted with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot, and of unsound mind, or his Majesty's high court of Chancery, shall be the protector of a settlement, such Lord High Chancellor, Lord Keeper, or Lords Commissioners, or person or persons so intrusted as aforesaid, or the said court of Chancery (as the case may be), while protector of such settlement, shall, on the motion or petition in a summary way, by a tenant in tail under such settlement, have full power to consent to a disposition, under this act, by such tenant in tail; and the disposition to be made by such tenant in tail upon such motion or petition as aforesaid, shall be such as shall be approved of by such Lord High Chancellor, Lord Keeper, or Lords Commissioners, or person or persons so intrusted as aforesaid, or the said court of Chancery (as the case may be); and it shall be lawful for such Lord High Chancellor, Lord Keeper, or Lords Commissioners, or person or persons so intrusted as aforesaid, or the said court of Chancery (as the case may be), to make such orders in the matter as shall be thought necessary; and, if such Lord High Chancellor, Lord Keeper, or Lords Commissioners, or person or persons so intrusted as aforesaid, or the said court of Chancery (as the case may be), shall, in lieu of any such person as aforesaid, be the protector of a settlement, and there shall be any other person protector of the same settlement jointly

3 & 4 W. 4, c. 74.

with such person as aforesaid, then and in every such case the disposition by the tenant in tail, though approved of as aforesaid, shall not be valid, unless such other person being protector as aforesaid shall consent thereto in the manner in which the consent of the protector is by this act required to be given.

Order of the Lord Chancellor, &c. to be evidence of consent.

XLIX. Provided always, and be it further enacted, That, in every case in which the Lord High Chancellor, Lord Keeper, or Lords Commissioners for the custody of the great seal, or other the person or persons intrusted with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot, and of unsound mind, or his Majesty's high court of Chancery, shall be the protector of a settlement, no document or instrument, as evidence of the consent of such protector to the disposition of a tenant in tail under such settlement, shall be requisite beyond the order in obedience to which the disposition shall have been made.

The previous clauses to apply to copyholds, with certain variations.

L. And be it further enacted, That all the previous clauses in this act, so far as circumstances and the different tenures will admit, shall apply to lands held by copy of court-roll, except that a disposition of any such lands under this act by a tenant in tail thereof whose estate shall be an estate at law, shall be made by surrender, and except that a disposition of any such lands under this act by a tenant in tail thereof whose estate shall be merely an estate in equity, may be made either by surrender or by a deed as hereinafter provided, and except so far as such clauses are otherwise altered or varied by the clauses hereinafter contained.

As to the deed of consent and the entry of it on the court-rolls where the protector of a settlement of

LI. Provided always, and be it further enacted (*k*), That, if the consent of the protector of a settlement to the disposition of lands held by copy of court-roll by a tenant in tail thereof shall be given by deed, such deed shall, either at or before the time when the surrender shall be made by which the disposition shall be effected, be executed by such protec-

(*k*) We propose as the substitute for barring entails in lands held by copy of court-roll, a surrender by the tenant in tail, and that the substitute in this case should have the same operation as the substitute in regard *to lands not held* by copy of court-roll, and that, if the concurrence of the first beneficial owner should be signified by a deed, such deed should be presented at the lord's court at the time when the surrender is presented or made.—1st Rep. p. 36.

tor, and produced to the lord of the manor of which the lands are parcel, or to his steward, or to the deputy of such steward; and the consent of such protector shall be void unless such deed shall be so executed and produced; and on the production of the deed the lord, or steward or deputy steward, shall by writing under his hand, to be indorsed on the deed, acknowledge that the same was produced within the time limited, and shall cause such deed, with the indorsement thereon, to be entered on the court rolls of the manor; and the indorsement, purporting to be so signed, shall of itself be prima facie evidence that the deed was produced within the time limited, and that the person who signed the indorsement was the lord of the manor, or his steward, or the deputy of such steward; and after such deed shall have been so entered, the lord of the manor, or his steward, or the deputy of such steward, shall indorse thereon a memorandum signed by him, testifying the entry of the same on the court rolls.

3 & 4 W. 4, c. 74.
copyholds
consents by deed to the disposition of a tenant in tail.

LII. Provided always, and be it further enacted, That if the consent of the protector of a settlement to the disposition of lands held by copy of court roll by a tenant in tail thereof shall not be given by deed, then and in such case the consent shall be given by the protector to the person taking the surrender by which the disposition shall be effected; and if the surrender shall be made out of court, it shall be expressly stated in the memorandum of such surrender, that such consent had been given, and such memorandum shall be signed by the protector; and the lord of the manor of which the lands are parcel, or his steward, or the deputy of such steward, shall cause the memorandum, with such statement therein as to the consent, to be entered on the court rolls of the manor; and such memorandum shall be good evidence of the consent and of the surrendertherein stated to be made; and the entry of the memorandum on the court rolls, or a copy of such entry, shall be as available for the purposes of evidence as any other entry on the court rolls, or a copy thereof; but if the surrender shall be made in court, the lord of the manor, or his steward, or the deputy of such steward, shall cause an entry of such surrender, containing a statement that such consent had been given, to

As to the consent of the protector of a settlement of copyholds when not given by deed, and the preserving of evidence of the same on the court rolls.

3 & 4 W. 4, c. 74.

be made on the court rolls; and the entry of such surrender on the court rolls, or a copy of such entry, shall be as available for the purposes of evidence as any other entry on the court rolls, or a copy thereof.

Power to equitable tenants in tail of copyholds to dispose of their lands by deed.

LIII. Provided always, and be it further enacted, That a tenant in tail of lands held by copy of court roll, whose estate shall be merely an estate in equity, shall have full power by deed to dispose of such lands under this act in the same manner in every respect as he could have done if they had been of freehold tenure; and all the previous clauses in this act shall, so far as circumstances will admit, apply to the lands in respect of which any such equitable tenant in tail shall avail himself of this present clause; and the deed by which the disposition shall be effected shall be entered on the court rolls of the manor of which the lands thereby disposed of may be parcel; and if there shall be a protector to consent to the disposition, and such protector shall give his consent by a distinct deed, the consent shall be void unless the deed of consent be executed by the protector either on or at any time before the day on which the deed of disposition shall be executed by the equitable tenant in tail; and such deed of consent shall be entered on the court rolls; and it shall be imperative on the lord of the manor, or his steward, or the deputy of such steward, when required so to do, to enter such deed or deeds on the court rolls, and he shall indorse on each deed so entered a memorandum signed by him, testifying the entry of the same on the court rolls: Provided always, that every deed by which lands held by copy of court roll shall be disposed of under this clause, by an equitable tenant in tail thereof, shall be void against any person claiming such lands, or any of them, for valuable consideration under any subsequent assurance duly entered on the court rolls of the minor* of which the lands may be parcel, unless the deed of disposition by the equitable tenant in tail be entered on the court rolls of such manor before the subsequent assurance shall have been entered.

* *Sic.*

Inrolment not necessary as to copyholds.

LIV. Provided always, and be it further enacted, That in no case where any disposition under this act of lands held by copy of court roll, by a tenant in tail thereof, shall be

effected by surrender or by deed, shall the surrender or the memorandum, or a copy thereof, or the deed of disposition, or the deed, if any, by which the protector shall consent to the disposition, require inrolment otherwise than by entry on the court rolls. 3 & 4 W. 4, c. 74.

LV. And be it further enacted, That after the thirty-first day of December, one thousand eight hundred and thirty-three, so much of an act passed in the sixth year of the reign of his late Majesty King George the Fourth, intituled "An Act to amend the laws relating to bankrupts," as empowers the commissioners named in any commission of bankrupt issued against a tenant in tail to make sale of any lands, tenements, and hereditaments, situate either in England or Ireland, whereof such bankrupt shall be seised of any estate tail in possession, reversion, or remainder, and whereof no reversion or remainder is in the crown, the gift or provision of the crown, shall be, and the same is hereby repealed: Provided always, that such repeal shall not extend to the lands, whatever the tenure may be, of any person adjudged a bankrupt under any commission of bankrupt, or under any fiat, which, in pursuance of the said act of the sixth year of the reign of King George the Fourth, or of any former act concerning bankrupts, or of an act passed in the first and second years of the reign of his Majesty King William the Fourth, intituled "An Act to establish a court of bankruptcy," hath been or shall be issued on or before the thirty-first day of December, one thousand eight hundred and thirty-three: Provided also, that such repeal shall not have the effect of reviving in any respect the acts repealed by the said act of the sixth year of the reign of King George the Fourth, or any of them. Repeal of the Bankrupt Act, 6 G. 4, c. 16, s. 65, so far as relates to estates tail, but not to extend to lands of a bankrupt under a commission or fiat issued on or before the 31st of Dec. 1833, nor to revive former acts.

LVI. And be it further enacted, That any commissioner acting in the execution of any fiat, which, after the thirty-first day of December, one thousand eight hundred and thirty-three, shall be issued in pursuance of the said act passed in the first and second years of the reign of King William the Fourth, under which any person shall be adjudged a bankrupt, who at the time of issuing such fiat, or at any time afterwards, before he shall have obtained his certificate, shall be an actual tenant in tail of lands of any The commissioner, in the case of an actual tenant in tail becoming bankrupt after the 31st of Dec. 1833, by deed to dispose of the lands of the bank-

3 & 4 W. 4, c. 74.

tenure, shall by deed dispose of such lands to a purchaser for valuable consideration, for the benefit of the creditors of such actual tenant in tail, and shall create by any such disposition as large an estate in the lands disposed of as the actual tenant in tail, if he had not become bankrupt, could have done under this act at the time of such disposition: Provided always, that if, at the time of the disposition of such lands, or any of them, by such commissioner as aforesaid, there shall be a protector of the settlement by which the estate of such actual tenant in tail in the lands disposed of by such commissioner was created, and the consent of such protector would have been requisite to have enabled the actual tenant in tail, if he had not become bankrupt, to have disposed of such lands to the full extent to which, if there had been no such protector, he could under this act have disposed of the same, and such protector shall not consent to the disposition, then and in such case, the estate created in such lands, or any of them, by the disposition of such commissioner, shall be as large an estate as the actual tenant in tail, if he had not become bankrupt, could at the time of such disposition have created under this act in such lands without the consent of the protector.

rupt to a purchaser.

Commissioner, in case of a tenant in tail entitled to a base fee becoming bankrupt, and of there being no protector, by deed to dispose of the lands of the bankrupt to a purchaser.

LVII. And be it further enacted, that any commissioner acting in the execution of any such fiat as aforesaid, under which any person shall be adjudged a bankrupt, who at the time of issuing such fiat, or at any time afterwards, before he shall have obtained his certificate, shall be a tenant in tail entitled to a base fee in lands of any tenure, shall by deed dispose of such lands to a purchaser for valuable consideration, for the benefit of the creditors of the person so entitled as aforesaid, provided at the time of the disposition there be no protector of the settlement by which the estate tail converted into the base fee was created; and by such disposition the base fee shall be enlarged into as large an estate as the same could at the time of such disposition have been enlarged into under this act, by the person so entitled if he had not become bankrupt.

As to the consent of the protector in case

LVIII. And be it further enacted, That the commissioner acting in the execution of any such fiat as aforesaid, under which a person being, or before obtaining his certificate be-

coming, an actual tenant in tail of lands of any tenure, or a tenant in tail entitled to a base fee in lands of any tenure, shall be adjudged a bankrupt, shall, if there shall be a protector of the settlement by which the estate tail of such actual tenant in tail, or the estate tail converted into a base fee (as the case may be), was created, stand in the place of such actual tenant in tail, or tenant in tail so entitled as aforesaid, so far as regards the consent of such protector; and the disposition of such lands, or any of them, by such commissioner as aforesaid, if made with the consent of such protector, shall, whether such commissioner may have made under this act a prior disposition of the same lands without the consent of such protector or not, or whether a prior sale or conveyance of the same lands shall have been made or not, under the said acts of the sixth year of King George the Fourth, and the first and second years of King William the Fourth, or either of them, or any acts hereafter to be passed concerning bankrupts, have the same effect as such disposition would have had if such actual tenant in tail, or tenant in tail so entitled as aforesaid, had not become bankrupt, and such disposition had been made by him under this act, with the consent of such protector; and all the previous clauses in this act, in regard to the consent of the protector to the disposition of a tenant in tail of lands not held by copy of court roll, and in regard to the time and manner of giving such consent, and in regard to the inrolment of the deed of consent, where such deed shall be distinct from the assurance by which the disposition of the commissioner shall be effected, shall, except so far as the same may be varied by the clause next herein-after contained, apply to every consent that may be given by virtue of this present clause.

of bankruptcy.

LIX. And be it further enacted, That every deed, by which any commissioner, acting in the execution of any such fiat as aforesaid, shall, under this act, dispose of lands not held by copy of court roll, shall be void unless inrolled in his Majesty's high court of Chancery within six calendar months after the execution thereof; and every deed, by which any commissioner, acting in the execution of any such fiat as aforesaid, shall, under this act, dispose of lands

As to the inrolment in Chancery of the deed of disposition of freehold lands, and the entry on the court-rolls of the deed of disposi-

3 & 4 W. 4, c. 74. tion of copyhold lands;

held by copy of court roll, shall be entered on the court rolls of the manor of which the lands may be parcel; and if there shall be a protector who shall consent to the disposition of such lands held by copy of court roll, and he shall give his consent by a distinct deed, the consent shall be void, unless the deed of consent be executed by the protector either on or at any time before the day on which the deed of disposition shall be executed by the commissioner; and such deed of consent shall be entered on the court rolls; and it shall be imperative on the lord of every manor of which any lands disposed of under this act by any such commissioner as aforesaid may be parcel, or the steward of such lord, or the deputy of such steward, to enter on the court rolls of the manor every deed required by this present clause to be entered on the court rolls; and he shall indorse on every deed so entered a memorandum, signed by him, testifying the entry of the same on the court rolls.

and of the deed of consent.

Subsequent enlargement of base fees created by the disposition of the commissioner.

LX. And be it further enacted, That, if any commissioner, acting in the execution of any such fiat as aforesaid, shall, under this act, dispose of any lands of any tenure of which the bankrupt shall be actual tenant in tail, and in consequence of there being a protector of the settlement by which the estate of such actual tenant in tail was created, and of his not giving his consent, only a base fee shall by such disposition be created in such lands, and if at any time afterwards during the continuance of the base fee there shall cease to be a protector of such settlement, then and in such case, and immediately thereupon, such base fee shall be enlarged into the same estate into which the same could have been enlarged under this act, if, at the time of the disposition by such commissioner as aforesaid, there had been no such protector.

Enlargement of base fees subsequent to the sale or conveyance of the same under the Bankrupt Acts.

LXI. And be it further enacted, That, if a tenant in tail entitled to a base fee in lands of any tenure shall be adjudged a bankrupt, at the time when there shall be a protector of the settlement by which the estate tail converted into the base fee was created, and if such lands shall be sold or conveyed under the said acts of the sixth year of King George the Fourth, and the first and second years of King William the Fourth, or either of them, or

any other acts hereafter to be passed concerning bankrupts, and if at any time afterwards during the continuance of the base fee in such lands there shall cease to be a protector of such settlement, then and in such case, and immediately thereupon, the base fee in such lands shall be enlarged into the same estate into which the same could have been enlarged under this act, if at the time of the adjudication of such bankruptcy there had been no such protector, and the commissioner, acting in the execution of the fiat under which the tenant in tail so entitled shall have been adjudged a bankrupt, had disposed of such lands under this act.

A voidable estate created in favour of a purchaser by an actual tenant in tail becoming bankrupt, or by a tenant in tail entitled to a base fee becoming bankrupt, confirmed by the disposition of the commissioner, if no protector, or being such with his consent, or on there ceasing to be a protector; but not against a purchaser, without notice.

LXII. Provided always, and be it further enacted, That, where an actual tenant in tail of lands of any tenure, or a tenant in tail entitled to a base fee in lands of any tenure, shall have already created or shall hereafter create in such lands, or any of them, a voidable estate in favour of a purchaser for valuable consideration, and such actual tenant in tail, or tenant in tail so entitled as aforesaid, shall be adjudged a bankrupt under any such fiat as aforesaid, and the commissioner acting in the execution of such fiat shall make any disposition under this act of the lands in which such voidable estate shall be created, or any of them, then and in such case, if there shall be no protector of the settlement by which the estate tail of the actual tenant in tail, or the estate tail converted into a base fee, as the case may be, was created, or being such protector he shall consent to the disposition by such commissioner as aforesaid, whether such commissioner may have made under this act a previous disposition of such lands or not, or whether a prior sale or conveyance of the same lands shall have been made or not under the said acts of the sixth year of King George the Fourth and the first and second years of King William the Fourth, or either of them, or any other acts hereafter to be passed concerning bankrupts, the disposition by such commissioner shall have the effect of confirming such voidable estate in the lands thereby disposed of to its full extent as against all persons except those whose rights are saved by this act; and if at the time of the disposition by such commissioner, in the case of an actual tenant in tail, there

3 & 4 W. 4, c. 74.

shall be a protector, and such protector shall not consent to the disposition by such commissioner, and such actual tenant in tail, if he had not been adjudged a bankrupt, would not without such consent have been capable under this act of confirming the voidable estate to its full extent, then and in such case such disposition shall have the effect of confirming such voidable estate so far as such actual tenant in tail, if he had not been adjudged a bankrupt, could at the time of such disposition have been capable under this act of confirming the same without such consent; and if at any time after the disposition of such lands by such commissioner, and while only a base fee shall be subsisting in such lands, there shall cease to be a protector of such settlement, and such protector shall not have consented to the disposition by such commissioner, then and in such case such voidable estate, so far as the same may not have been previously confirmed, shall be confirmed to its full extent as against all persons except those whose rights are saved by this act: Provided always, that if the disposition by any such commissioner as aforesaid shall be made to a purchaser for valuable consideration, who shall not have express notice of the voidable estate, then and in such case the voidable estate shall not be confirmed against such purchaser and the persons claiming under him.

Acts of a bankrupt tenant in tail void against any disposition under this act by the commissioner.

LXIII. And be it further enacted, That all acts and deeds done and executed by a tenant in tail of lands, of any tenure, who shall be adjudged a bankrupt under any such fiat as aforesaid, and which shall affect such lands or any of them, and which, if he had been seised of or entitled to such lands in fee simple absolute, would have been void against the assignees of the bankrupt's estate, and all persons claiming under them, shall be void against any disposition which may be made of such lands under this act by such commissioner as aforesaid.

Subject to the powers given to the commissioner, and to the estate in the assignees, a bankrupt

LXIV. Provided always, and be it further enacted, That, subject and without prejudice to the powers of disposition given by this act to the commissioner acting in the execution of any such fiat as aforesaid, under which a person being, or before obtaining his certificate becoming, an actual tenant in tail of lands of any tenure, or a tenant in tail en-

titled to a base fee in lands of any tenure shall be adjudged a bankrupt, and also subject and without prejudice to the estate in such lands which may be vested in the assignees of the bankrupt's estate, and also subject and without prejudice to the rights of all persons claiming under the said assignees in respect of such lands or any of them, such actual tenant in tail, or tenant in tail so entitled as aforesaid, shall have the same powers of disposition under this act in regard to such lands as he would have had if he had not become bankrupt.

3 & 4 W. 4, c. 74.

tenant in tail shall retain his powers of disposition.

LXV. And be it further enacted, That any disposition under this act of lands of any tenure by any commissioner acting in the execution of any such fiat as aforesaid, under which a person being, or before obtaining his certificate becoming, an actual tenant in tail of such lands, or a tenant in tail entitled to a base fee in such lands, shall be adjudged a bankrupt, shall, although the bankrupt be dead at the time of the disposition, be in the following cases as valid and effectual as the same would have been, and have the same operation under this act as the same would have had, if the bankrupt were alive; (that is to say) in case, at the time of the bankrupt's decease, there shall be no protector of the settlement by which the estate tail of the actual tenant in tail, or the estate tail converted into a base fee, as the case may be, was created; or in case the bankrupt had been an actual tenant in tail of such lands, and there shall, at the time of the disposition, be any issue inheritable to the estate tail of the bankrupt in such lands, and either no protector of the settlement by which the estate tail was created, or a protector of such settlement, who, in the manner required by this act, shall consent to the disposition, or a protector of such settlement who shall not consent to the disposition; or in case the bankrupt had been a tenant in tail entitled to a base fee in such lands, and there shall at the time of the disposition be any issue, who, if the base fee had not been created, would have been actual tenant in tail of such lands, and either no protector of the settlement by which the estate tail converted into a base fee was created, or a protector of such settlement, who, in the manner required by this act, shall consent to the disposition.

The disposition by the commissioner of the lands of a bankrupt tenant in tail shall, if the bankrupt be dead, have in the cases herein mentioned the same operation as if he were alive.

3 & 4 W. 4, c. 74.

Every disposition by the commissioner of copyhold lands, where the estate shall not be equitable, to have the same operation as a surrender; and the person to whom such land shall have been disposed of may claim to be admitted on paying the fines, &c.

LXVI. And be it further enacted, That every disposition, which under this act may be made by any commissioner acting in the execution of any such fiat as aforesaid, of lands held by copy of court roll, shall, in every case in which the estate of the bankrupt in such lands shall not be merely an estate in equity, operate in the same manner as if such lands had, for the same estate which shall have been acquired by the disposition by such commissioner as aforesaid, been duly surrendered into the hands of the lord of the manor of which they may be parcel, to the use of the person to whom the same shall have been disposed of by such commissioner; and the person, to whom the lands shall have been so disposed of by such commissioner, may claim to be admitted tenant of such lands, to hold the same by the ancient rents, customs, and services, in the same manner as if such lands had been duly surrendered to his use into the hands of the lord of the manor of which such lands may be parcel, and shall, upon being admitted tenant of such lands, to hold the same as aforesaid, pay the fines, fees, and other dues which could have been lawfully demanded upon such admittance, if such lands had, for the same estate which shall have been acquired by the disposition by such commissioner as aforesaid, passed by surrender into the hands of the lord, to the use of the person so admitted.

Assignees to recover rents of the lands of a bankrupt, of which the commissioner has power to make disposition, and to enforce covenants, as if entitled to the reversion. This clause to apply to all copyhold lands; but as to other lands, only to such as the commissioner may

LXVII. And be it further enacted, That the rents and profits of any lands, of which any commissioner acting in the execution of any such fiat as aforesaid hath power to make disposition under this act, shall in the mean time, and until such disposition shall be made, or until it shall be ascertained that such disposition shall not be required for the benefit of the creditors of the person adjudged bankrupt under the fiat, be received by the assignees of the estate of the bankrupt, for the benefit of his creditors; and the assignees may proceed by action of debt for the recovery of such rents and profits, or may distrain for the same upon the lands subject to the payment thereof, and, in case any action of trespass shall be brought for taking any such distress, may plead thereto the general issue, and give this act or other special matter in evidence, and also, in case any such distress shall be replevied, shall have power to avow

or make cognizance, generally in such manner and form as any landlord may now do by virtue of the statute made in the eleventh year of the reign of his Majesty King George the Second, intituled "An Act for the more effectual securing the payment of rents, and preventing frauds by tenants," or by any other law or statute now in force, or hereafter to be made, for the more effectually recovering of rent in arrear; and such assignees, and their bailiffs, agents, and servants, shall also have all such and the same remedies, powers, privileges, and advantages of pleading, avowing, and making cognizance, and be entitled to the same costs and damages, and the same remedies for the recovery thereof, as landlords, their bailiffs, agents, and servants, are now or hereafter may be by law entitled to have when rent is in arrear; and such assignees shall also have the same power and authority of enforcing the observance of all covenants, conditions, and agreements, in respect of the lands of which such commissioner as aforesaid hath the power of disposition under this act, and in respect of the rents and profits thereof, and of entry into and upon the same lands, for the nonobservance of any such covenant, condition, and agreement, and of expelling and amoving therefrom the tenants or other occupiers thereof, and thereby determining and putting an end to the estate of the persons who shall not have observed such covenants, conditions, and agreements, as the bankrupt would have had in case he had not been adjudged a bankrupt: Provided always, that this clause shall apply to all lands held by copy of court roll, but shall only apply to those lands of any other tenure which any commissioner acting in the execution of any such fiat as aforesaid may have power to dispose of under this act after the bankrupt's decease.

3 & 4 W. 4, c. 74. dispose of after the bankrupt's death. 11 G. 2, c. 19.

LXVIII. And be it further enacted, That all the provisions in this act contained for the benefit of the creditors of persons who under such fiats as aforesaid shall be adjudged bankrupts after the thirty-first day of December, one thousand eight hundred and thirty-three, and for the confirmation in consequence of bankruptcy of voidable estates created by them, shall extend and apply to the lands of any tenure in Ireland of such persons, as fully and effectually as if this act had throughout extended to lands of any

All the provisions of the act in regard to bankrupts shall apply to their lands in Ireland.

3 & 4 W. 4, c. 74.

tenure in Ireland; saving always the rights of the King's most excellent Majesty, his heirs and successors, to any reversion or remainder in the crown in lands in Ireland.

Deeds relating to the lands of bankrupts in Ireland to be inrolled in the court of Chancery there.

LXIX. Provided always, and be it further enacted, That, in all cases of bankruptcy, every deed of disposition under this act of lands in Ireland by any commissioner acting in the execution of any such fiat as aforesaid, and also every deed by which the protector of a settlement of lands in Ireland shall consent, shall be inrolled in his Majesty's High Court of Chancery in Ireland within six calendar months after the execution thereof, and not in his Majesty's high court of Chancery in England.

Repeal of the statute 7 Geo. 4, c. 45, ex-

LXX. And be it further enacted (*l*), That, after the thirty-first day of December, one thousand eight hundred and thirty-three, an act passed in the seventh year of the reign

(*l*) Sections 40—42. Money directed to be laid out in the purchase of land is considered by a court of equity as converted into real estate; formerly, a person who would have been entitled to the land if purchased as tenant in tail, was enabled by a court of equity to receive the money, if he could have acquired the fee by a fine, but not if a recovery would have been requisite, in which case it was necessary to purchase land, in order to suffer a recovery. This inconvenience was removed by two successive acts of the legislature; the latter of which, 7 Geo. 4, c. 45, repealing the former, 39 & 40 Geo. 3, c. 56, provided relief, by a summary proceeding in the court of Chancery, for the several cases in which parties entitled to money so circumstanced, could by fine or recovery have acquired dominion over the land if purchased. Upon this state of the law the commissioners make the following observations, upon which the enactments in the text are grounded—"We recommend that the 39 & 40 Geo. 3, c. 56, and 7 Geo. 4, c. 45, should be repealed, and that the substitute for fines and recoveries should be made applicable to money to be laid out in land to be entailed. For we can see no reason why money so circumstanced should not be unfettered by the same process as the land itself would be if purchased. Fines and recoveries could not, from their nature, be made to apply to money, and consequently an application to the court of Chancery was the expensive expedient resorted to; but the same objection does not apply to the substitute. When by means of the substitute the money is discharged from the entail and remainders, or, as may sometimes happen, from an entail only, the trustees will, if the money should be discharged from all interests and charges subsequent to the entail, and there should be none such subsisting, either upon the interest in tail or prior thereto, pay it over immediately to the person barring the entail, and will, if there should be any interests and charges still subsisting, hold it in trust for the person barring the entail, and the persons entitled to such interests and charges. If the money should be in court, it may be paid upon application to the court, on producing evidence that the person barring the entail is entitled to receive it."

of his late Majesty King George the Fourth, intituled "An Act for repealing an act passed in the thirty-ninth and fortieth years of the reign of his late Majesty King George the Third, intituled 'An Act for the relief of persons entitled to entailed estates to be purchased with trust monies,' and for making further provision in lieu thereof," shall be and the same is hereby repealed, except as to such proceedings under the act hereby repealed as shall have been commenced before the first day of January, one thousand eight hundred and thirty-four, and which may be continued under the authority and according to the provisions of the act hereby repealed: Provided always, that the act repealed by the said act of the seventh year of the reign of his late Majesty King George the Fourth shall not be revived.

3 & 4 W. 4, c. 74. except as to proceedings commenced before 1st Jan. 1834.

39 & 40 Geo. 3, c. 56 not to be revived.

LXXI. And be it further enacted, That lands to be sold, whether freehold or leasehold, or of any other tenure, where the money arising from the sale thereof shall be subject to be invested in the purchase of lands to be settled, so that any person, if the lands were purchased, would have an estate tail therein, and also money subject to be invested in the purchase of lands to be settled, so that any person, if the lands were purchased, would have an estate tail therein, shall, for all the purposes of this act, be treated as the lands to be purchased, and be considered subject to the same estates as the lands to be purchased would, if purchased, have been actually subject to; and all the previous clauses in this act, so far as circumstances will admit, shall, in the case of the lands to be sold as aforesaid being either freehold or leasehold, or of any other tenure, except copy of court roll, apply to such lands in the same manner as if the lands to be purchased with the money to arise from the sale thereof were directed to be freehold, and were actually purchased and settled; and shall, in the case of the lands to be sold as aforesaid being held by copy of court roll, apply to such lands in the same manner as if the lands to be purchased with the money to arise from the sale thereof were directed to be copyhold, and were actually purchased and settled; and shall in the case of money subject to be invested in the purchase of lands to be so settled as aforesaid, apply to such money in the same manner as if such money were directed to be laid out in the pur-

The previous clauses, with certain variations, to apply to lands of any tenure to be sold, where the purchase money is subject to be invested in the purchase of lands to be entailed, and where money is subject to be invested in like manner.

3 & 4 W. 4, c. 74.

chase of freehold lands, and such lands were actually purchased and settled; save and except that in every case, where under this clause a disposition shall be to be made of leasehold lands for years absolute or determinable, so circumstanced as aforesaid, or of money so circumstanced as aforesaid, such leasehold lands or money shall, as to the person in whose favour or for whose benefit the disposition is to be made, be treated as personal estate, and, except in case of bankruptcy, the assurance by which the disposition of such leasehold lands or money shall be effected shall be an assignment by deed, which shall have no operation under this act unless inrolled in his Majesty's high court of Chancery within six calendar months after the execution thereof; and in every case of bankruptcy the disposition of such leasehold lands or money shall be made by the commissioner, and completed by inrolment, in the same manner as herein-before required in regard to lands not held by copy of court roll.

Lands of any tenure in Ireland, to be sold, where the purchase money is subject to be invested in the purchase of lands to be entailed, and money under the control of a court of equity in Ireland, subject to be invested in like manner, to be subject to this act in cases of bankruptcy.

LXXII. And be it further enacted, That, so far as regards any person adjudged a bankrupt under any such fiat as aforesaid, the provisions of the clause lastly herein-before contained shall, for the benefit of the creditors of the bankrupt, apply to lands in Ireland to be sold, whether freehold or leasehold, or of any other tenure, where the money arising from the sale thereof shall be subject to be invested in the purchase of lands to be settled, so that the bankrupt, if the lands were purchased, would have an estate tail therein, and also to money under the control of any court of equity in Ireland, or of or to which any individuals as trustees may be possessed or entitled in Ireland, and which shall be subject to be invested in the purchase of lands to be settled, so that the bankrupt, if the lands were purchased, would have an estate tail therein, as fully and effectually as if this act had throughout extended to Ireland: Provided always, that every deed to be executed by any commissioner or protector, in pursuance of this clause, in regard to lands in Ireland, to be so sold as aforesaid, shall be inrolled in his Majesty's high court of Chancery in Ireland, within six calendar months after the execution thereof; but every deed to be executed by any commissioner or protector, in pursuance of this clause, in regard to money subject to be invested in the

purchase of lands to be so settled as aforesaid, shall be inrolled in his Majesty's high court of Chancery in England, within six calendar months after the execution thereof, and not in his Majesty's high court of Chancery in Ireland; saving always the rights of the King's most excellent Majesty, his heirs and successors, to any reversion or remainder in the crown in lands in Ireland to be sold.

As to deeds being acknowledged before inrolment.

LXXIII. And be it further enacted, That any rule or practice requiring deeds to be acknowledged before inrolment shall not apply to any deed by this act required to be inrolled in his Majesty's high court of Chancery in England or Ireland.

Every deed to be inrolled, by which lands or money shall be disposed of under this act, to take effect as if inrolment not required.

LXXIV. And be it further enacted, That every deed required to be inrolled in his Majesty's high court of Chancery in England or Ireland, by which lands, or money subject to be invested in the purchase of lands, shall be disposed of under this act, shall, when inrolled as required by this act, operate and take effect in the same manner as it would have done if the inrolment thereof had not been required, except that every such deed shall be void against any person claiming the lands or money thereby disposed of, or any part thereof, for valuable consideration, under any subsequent deed duly inrolled under this act, if such subsequent deed shall be first inrolled.

The court of Chancery to regulate the fees to be paid for the inrolment of deeds, &c.

LXXV. And be it further enacted, That it shall be lawful for his Majesty's high court of Chancery in England, as to deeds to be inrolled in England under this act, and for his Majesty's high court of Chancery in Ireland, as to deeds to be inrolled in Ireland under this act, from time to time to make such orders as the court shall think fit, touching the amount of the fees and charges to be paid for the inrolment of such deeds, and to be paid for searches for such deeds in the office of inrolments, and to be paid for copies of the inrolments of deeds under this act, where such copies are examined with the inrolments, and signed by the proper officer having the custody of such inrolments.

The court of Common Pleas to regulate the fees for entries on court-rolls

LXXVI. And be it further enacted, That it shall be lawful for his Majesty's court of Common Pleas, at Westminster, from time to time, to make such orders as the court shall think fit, touching the amount of the fees and charges to be paid for the entries of deeds by this act re-

3 & 4 W. 4, c. 74. and indorsements on deeds, and for taking consents, &c.

quired to be entered on the court rolls of manors, and for the indorsements thereon, and for taking the consents of the protectors of settlements of lands held by copy of court roll, where such consents shall not be given by deed, and for taking surrenders by which dispositions shall be made under this act by tenants in tail of lands held by copy of court roll, and for entries of such surrenders, or the memorandums thereof on the court rolls.

A married

LXXVII. And be it further enacted, (*m*) That, after the

(*m*) As before this act married women could only have conveyed their interests in real estate by means of a fine or recovery, and as by this act fines and recoveries are abolished, it became necessary to provide a new mode of alienating such interests, which is accordingly done in this and the following sections to 72 inclusive. With regard to this part of the subject the commissioners make the following observations:—

"With regard to the alienation by a married woman of her real estate, the only utility of the fine appears to consist in its providing for her separate examination, and placing this examination under the superintendence of a court of justice, so as to avoid all future question as to the fact of the examination having been properly taken.

"As this examination affords, undoubtedly, some protection (though perhaps, in many cases, an insufficient one), and it appears to be the only protection which can be afforded without imposing too great a restraint on alienation, we think that very nearly the same mode of examination should be continued, although we do not think that a fine is necessary for the purpose.

"What we propose is, that standing commissioners shall be appointed for each county by the Chief Justice of the Common Pleas; and that a married woman shall, upon a private examination, as to her free consent, by *one of the judges*, a master in chancery, or any two of the commissioners to be so appointed, be allowed, with the concurrence of her husband, to dispose of her real estate by deed, as if she were feme sole. The deed by which the disposition is made will have indorsed upon it, by the judge, master in chancery, or commissioners, a certificate of the fact of the examination having taken place; a corresponding certificate, identifying the deed, will be transmitted to the proper office of the court of Common Pleas, accompanied by such an affidavit as that court may require; the officer, on ascertaining their authenticity and regularity, will inrol the certificate and file the affidavit; and thus the proceeding will be complete. An office copy of the inrolled certificate, which will accompany the deed, will furnish the evidence of its regularity. When a married woman is abroad, and in some other cases, a special commission from the court of Common Pleas to take her examination may issue as at present.

"It appears to us, that by these means all that is now accomplished by a fine will be equally well accomplished, and in a more simple manner.

"Our reason for requiring the inrolment of the certificate is, that by these means the examination will be still under the superintendence of the court, and the sanction of the court being given to each examination, any future question, as to its having been properly taken, will be prevented. We

thirty-first day of December, one thousand eight hundred and thirty-three, it shall be lawful for every married woman, in every case, except that of being tenant in tail, for which provision is already made by this act, by deed to dispose of lands of any tenure, and money subject to be invested in the purchase of lands, and also to dispose of, release, surrender, or extinguish any estate which she alone, or she and her husband in her right, may have in any lands of any tenure, or in any such money as aforesaid, and also to release or extinguish any power which may be vested in, or limited or reserved to her in regard to any lands of any tenure, or any such money as aforesaid, or in regard to any estate in any lands of any tenure, or in any such money as aforesaid, as fully and effectually as she could do if she were a feme sole; save and except that no such disposition, release, surrender, or extinguishment, shall be valid and effectual, unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter directed: provided always, that this act shall not extend to lands held by copy of court roll, of or to which a married woman, or she and her husband in her right, may be seised or entitled for an estate at law, in any case in which any of the objects to be effected by this clause could, before the passing of this act, have been effected by her, in concurrence with her husband, by surrender into the hands of the lord of the manor of which the lands may be parcel.

3 & 4 W. 4, c. 74.

Married woman, with her husband's concurrence, to dispose of lands and money subject to be invested in the purchase of lands, and of any estate therein; and to release and extinguish powers, as a feme sole.

Not to extend to copyholds in certain cases.

LXXVIII. Provided always, and be it further enacted,

Powers of

propose that the court shall still have the power which it now has of making orders with respect to the mode of taking the examination, in order that such provisions may, from time to time, be made as experience may suggest. It will be the duty of the officer, in each instance, to see that these orders have been complied with, before he inrolls the certificate. If any doubt arises, special application will be made to the court.

As the sanction of the court will be thus given by the inrolment of the certificate, we think that the inrolment should be essential to the validity of the transaction; at the same time, we think, that, when the deed has been properly executed and acknowledged, it should be considered as complete, subject to the condition of the certificate being afterwards duly inrolled, and that the deed should, therefore, take effect from the time of its execution and acknowledgment, and not from the time of the certificate being inrolled.—1st Rep. p. 18.

3 & 4 W. 4, c. 74.

disposition given to a married woman by this act not to interfere with any other powers.

That the powers of disposition given to a married woman by this act shall not interfere with any power which, independently of this act, may be vested in or limited or reserved to her, so as to prevent her from exercising such power in any case, except so far as by any disposition made by her under this act she may be prevented from so doing in consequence of such power having been suspended or extinguished by such disposition.

Every deed by a married woman, not executed by her as protector, to be acknowledged by her before a judge, &c.

LXXIX. And be it further enacted, That every deed to be executed by a married woman for any of the purposes of this act, except such as may be executed by her in the character of protector, for the sole purpose of giving her consent to the disposition of a tenant in tail, shall, upon her executing the same, or afterwards, be produced and acknowledged by her as her act and deed before a judge of one of the superior courts at Westminster, or a master in Chancery, or before two of the perpetual commissioners, or two special commissioners, to be respectively appointed as hereinafter provided.

The judge, &c. before receiving such acknowledgment, to examine her apart from her husband.

LXXX. And be it further enacted, That such judge, master in Chancery, or commissioners as aforesaid, before he or they shall receive the acknowledgment by any married woman of any deed by which any disposition, release, surrender, or extinguishment shall be made by her under this act, shall examine her, apart from her husband, touching her knowledge of such deed, and shall ascertain whether she freely and voluntarily consents to such deed, and, unless she freely and voluntarily consent to such deed, shall not permit her to acknowledge the same; and, in such case such deed shall, so far as relates to the execution thereof by such married woman, be void.

As to the appointment of perpetual commissioners for each county or place, and the making out and keeping of the lists of the commissioners, and

LXXXI. And be it further enacted, That, for the purpose of providing convenient means of taking acknowledgments by married women of the deeds to be executed by them as aforesaid, the Lord Chief Justice of the court of Common Pleas at Westminster shall from time to time appoint such proper persons as he shall think fit, for every county, riding, division, soke, or place for which there may be a clerk of the peace, to be perpetual commissioners for taking such acknowledgments, and such commissioners

shall be removable by and at the pleasure of the said Lord Chief Justice; and lists of the names of such commissioners for the time being, with the names of their places of residence, and the counties, ridings, divisions, sokes, or places for which they shall be respectively appointed to act, shall from time to time be made out and be kept by the officer of the court of Common Pleas at Westminster, with whom the certificates of the acknowledgments by married women are to be lodged as hereinafter mentioned; and such officer shall from time to time transmit, without fee or reward, to the clerk of the peace for each county, riding, division, soke, or place, or his deputy, a copy of the list to be so from time to time made out for that county, riding, division, soke, or place, and such officer shall deliver a copy, signed by him, of the list for the time being for any county, riding, division, soke, or place, to any person applying for the same; and the clerk of the peace for each county, riding, division, soke, or place, or his deputy, shall deliver a copy, signed by him, of the list last transmitted to him as aforesaid to any person applying for the same.

3 & 4 W. 4, c. 74. the delivery of copies.

LXXXII. Provided always, and be it further enacted, That any person appointed commissioner for any particular county, riding, division, soke, or place, shall be competent to take the acknowledgment of any married woman wheresoever she may reside, and wheresoever the lands or money in respect of which the acknowledgment is to be taken may be.

Power of perpetual commissioners not confined to any particular place.

LXXXIII. And be it further enacted, That, in those cases where, by reason of residence beyond seas, or ill-health, or any other sufficient cause, any married woman shall be prevented from making the acknowledgment required by this act before a judge or a master in Chancery, or any of the perpetual commissioners to be appointed as aforesaid, it shall be lawful for the court of Common Pleas at Westminster, or any judge of that court, to issue a commission specially appointing any persons therein named to commissioners to take the acknowledgment by any married woman to be therein named of any such deed as aforesaid: Provided always, that every such commission shall be made

If, from being beyond seas, &c. a married woman be prevented from making the acknowledgment, special commissioners to be appointed.

3 & 4 W. 4, c. 74.

returnable within such time, to be therein expressed, as the said court or judge shall think fit.

When a married woman shall acknowledge a deed, the person taking the acknowledgment to sign a memorandum to the effect here mentioned,

LXXXIV. And be it further enacted, That, when a married woman shall acknowledge any such deed as aforesaid, the judge, master in Chancery, or commissioners taking such acknowledgment shall sign a memorandum, to be indorsed on or written at the foot or in the margin of such deed, which memorandum, subject to any alteration which may from time to time be directed by the court of Common Pleas, shall be to the following effect; *videlicet*,

"THIS deed, marked [*here add some letter or other mark, for the purpose of identification*], was this day produced before me [*or* us] and acknowledged by therein named to be her act and deed; previous to which acknowledgment the said was examined by me [*or* us], separately and apart from her husband, touching her knowledge of the contents of the said deed and her consent thereto, and declared the same to be freely and voluntarily executed by her."

and also sign a certificate of the taking of such acknowledgment, to the effect here mentioned.

And the same judge, master in Chancery, or commissioners shall also sign a certificate of the taking of such acknowledgment, to be written or engrossed on a separate piece of parchment; which certificate, subject to any alteration which may from time to time be directed by the court of Common Pleas, shall be to the following effect; *videlicet*,

"THESE are to certify, That, on the day of , in the year one thousand eight hundred and , before me the undersigned Sir Nicolas Conyngham Tindal, Lord Chief Justice of the court of Common Pleas at Westminster, [*or* before me Sir James Parke, Knight, one of the justices of the court of King's Bench at Westminster; *or* before me the undersigned James William Farrer, one of the masters in ordinary of the court of Chancery; *or* before us A. B. and C. D. two of the perpetual commissioners appointed for the for taking the acknowledgments of deeds by married women, pursuant to an act passed in the year of the reign of his

Majesty King William the Fourth, intituled an Act [*insert the title of this act*]; *or* before us the undersigned A. B. and C. D. , two of the commissioners specially appointed pursuant to an act passed in the year of the reign of his Majesty King William the Fourth, intituled an Act [*insert the title of this act*], for taking the Acknowledgment of any Deed by , the wife of appeared personally , the wife of , and produced a certain indenture, marked [*here add the mark*], bearing date the day of and made between [*insert the names of the parties*], and acknowledged the same to be her act and deed: And I [*or* we] do hereby certify, that the said was, at the time of her acknowledging the said deed, of full age and competent understanding, and that she was examined by me [*or* us], apart from her husband, touching her knowledge of the contents of the said deed, and that she freely and voluntarily consented to the same." 3 & 4 W. 4 c. 74.

Certificate, with affidavit verifying the same, to be lodged with some officer of the court of Common Pleas, who shall cause the same to be filed of record in the court.

LXXXV. And be it further enacted, That every such certificate as aforesaid of the taking of an acknowledgment by a married woman of any such deed as aforesaid, together with an affidavit by some person verifying the same, and the signature thereof by the party by whom the same shall purport to be signed, shall be lodged with some officer of the court of Common Pleas at Westminster, to be appointed as hereinafter mentioned; and such officer shall examine the certificate, and see that it is duly signed, either by some judge or master in Chancery, or by two commissioners appointed pursuant to this act, and duly verified by affidavit as aforesaid, and shall also see that it contains such statement of particulars as to the consent of the married woman, as shall from time to time be required in that behalf; and, if all the requisites in this act in regard to the certificate shall have been complied with, then such officer shall cause the said certificate, and the affidavit, to be filed of record in the said court of Common Pleas.

On filing certificate, the deed, by relation, to take effect from time

LXXXVI. And be it further enacted, That, when the certificate of the acknowlegment of a deed by a married woman shall be so filed of record as aforesaid, the deed so acknowledged shall, so far as regards the disposition, re-

3 & 4 W. 4, c. 74.

of acknowledgment.

lease, surrender, or extinguishment, thereby made by any married woman whose acknowledgment shall be so certified concerning any lands or money comprised in such deed, take effect from the time of its being acknowledged, and the subsequent filing of such certificate as aforesaid shall have relation to such acknowledgment.

The officer with whom the certificates are lodged to make an index of the same.

LXXXVII. And be it further enacted, That the officer of the court of Common Pleas with whom such certificates as aforesaid shall be lodged, shall make and keep an index of the same, and such index shall contain the names of the married women and their husbands alphabetically arranged, and the dates of such certificates, and of the deeds to which the same shall respectively relate, and such other particulars as shall be found convenient; and every such certificate shall be entered in the index as soon as may be after such certificate shall have been filed.

Officer to deliver a copy of certificate filed, which shall be evidence.

LXXXVIII. And be it further enacted, That, after the filing of any such certificate as aforesaid, the officer with whom the certificate shall be lodged, shall at any time deliver a copy, signed by him, of any such certificate to any person applying for such copy; and every such copy shall be received as evidence of the acknowledgment of the deed to which such certificate shall refer.

Chief Justice of Common Pleas to appoint the officer with whom the certificates shall be lodged; and the court to make orders touching the examination, memorandums, certificates, affidavits, &c.

LXXXIX. And be it further enacted, That the Lord Chief Justice of the court of Common Pleas at Westminster, shall from time to time appoint the person who shall be the officer with whom such certificates as aforesaid shall for the time being be lodged, and may remove him at pleasure; and the court of Common Pleas at Westminster shall also from time to time make such orders and regulations as the court shall think fit touching the mode of examination to be pursued by the commissioners to be appointed under this act, and touching the particular matters to be mentioned in such memorandums and certificates as aforesaid, and the affidavits verifying the certificates, and the time within which any of the aforesaid proceedings shall take place, and touching the amount of the fees or charges to be paid for the copies to be delivered by the clerks of the peace or their deputies, or by the officer of the said court, as herein-before directed, and also of the fees or charges to be paid for

taking acknowledgments of deeds, and for examining married women, and for the proceedings, matters, and things required by this act to be had, done, and executed for completing and giving effect to such acknowledgments and examinations. 3 & 4 W. 4, c. 74.

A married woman to be separately examined on the surrender of an equitable estate in copyholds, as if such estate were legal.

XC. And be it further enacted, That, in every case in which a husband and wife shall, either in or out of court, surrender into the hands of the lord of a manor any lands held by copy of court roll, parcel of the manor, and in which she alone, or she and her husband in her right, may have an equitable estate, the wife shall, upon such surrender being made, be separately examined by the person taking the surrender, in the same manner as she would have been if the estate to which she alone, or she and her husband in her right, may be entitled in such lands, were an estate at law instead of a mere estate in equity; and every such surrender, when such examination shall be taken, shall be binding on the married woman and all persons claiming under her; and all surrenders heretofore made of lands similarly circumstanced, where the wife shall have been separately examined by the person taking the surrender, are hereby declared to be good and valid.

Court of Common Pleas in the case of a husband being lunatic, &c. may dispense with his concurrence, except where the Lord Chancellor or other persons intrusted with lunatics, or the court of Chancery, shall be the protector of a settlement in lieu of the husband.

XCI. Provided always, and be it further enacted, That, if a husband shall, in consequence of being a lunatic, idiot, or of unsound mind, and whether he shall have been found such by inquisition or not, or shall from any other cause be incapable of executing a deed, or of making a surrender of lands held by copy of court roll, or if his residence shall not be known, or he shall be in prison, or shall be living apart from his wife, either by mutual consent or by sentence of divorce, or in consequence of his being transported beyond the seas, or from any other cause whatsoever, it shall be lawful for the court of Common Pleas at Westminster, by an order to be made in a summary way upon the application of the wife, and upon such evidence as to the said court shall seem meet, to dispense with the concurrence of the husband in any case in which his concurrence is required by this act or otherwise; and all acts, deeds, or surrenders to be done, executed, or made by the wife in pursuance of such order, in regard to lands of any tenure, or in regard to

3 & 4 W. 4, c. 74.

money subject to be invested in the purchase of lands, shall be done, executed, or made by her in the same manner as if she were a feme sole, and, when done, executed, or made by her, shall (but without prejudice to the rights of the husband as then existing independently of this act) be as good and valid as they would have been if the husband had concurred: Provided always, that this clause shall not extend to the case of a married woman where under this act the Lord High Chancellor, lord keeper, or lords commissioners for the custody of the great seal, or other the person or persons intrusted with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot, and of unsound mind, or his Majesty's high court of Chancery, shall be the protector of a settlement in lieu of her husband.

Ireland.

XCII. And be it further enacted, That this act shall not extend to Ireland, except where the same is expressly mentioned.

Act may be altered this session.

XCIII. And be it further enacted, That this act, or any part thereof, may be altered, varied, or repealed by any act or acts to be passed in the present session of parliament.

3 & 4 WILL. IV. CAP. CVI.

An Act for the Amendment of the Law of Inheritance (a).

[29th August, 1833.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and tem- 3 & 4 W. 4, c. 106.

(a) The rules which govern the transmission of freehold estates of inheritance at common law, on the decease of an absolute proprietor, in the absence of express disposition by him, are (for the most part) well understood, and appear to be well suited to the habits and feelings of the people. By these rules an estate descends to the eldest or only son, or his descendants, if he should be dead leaving issue, and next to the second and other sons, according to priority of birth, and their descendants; in default of sons and their descendants, it descends to daughters in equal shares, if more than one, and to the descendants of any deceased daughters, such descendants taking the share which would have gone to the parent if living. When there is no lineal descendant, the estate goes to the eldest or only brother of the whole blood, that is, who was born of the same father and mother as the deceased proprietor, and to his descendants, if he should be dead leaving issue, and to the other brothers in succession and their descendants. If there be no brother, or descendants of a brother, the sisters of the whole blood succeed in equal shares, and the descendants of deceased sisters, such descendants taking their parent's share as before. In case of the failure of brothers and sisters and their descendants, it becomes necessary to inquire whether the deceased proprietor took the estate himself by inheritance, or whether he acquired it immediately by a deed or will, or, in technical language, was a purchaser. In the former case, the heir is to be sought in the family from which the estate descended to the deceased proprietor, that is, either on the father's side or on the mother's side, as it happened; in the latter case, the law gives the preference to the relations on the paternal side, but, if there be none such, then it directs the inheritance to go to the relations on the maternal side.

Here occurs a rule, drawn from feudal principles, which is at variance with ordinary feelings and notions, and has been long considered unjust: every lineal ancestor of the deceased proprietor, whether near or remote, is excluded from immediately inheriting. An estate may pass to the younger brother of the father, and upon his death it may pass to the father as his heir; but rather than go at once to the father or the mother of the deceased proprietor, the law directs it to escheat, that is, to fall, as for want of an heir, to the lord of whom the land was holden; that is, in most cases, to the crown. In default, however, of lineal and immediate collateral heirs and their descendants, the inheritance is to be traced through the

3 & 4 W. 4, c. 106.

Meaning of words in the act:

poral and Commons in this present parliament assembled, and by the authority of the same, That the words and expressions herein-after mentioned, which in their ordinary signification have a more confined or a different meaning,

nearest ancestor, that is, the father, unless it be a maternal inheritance, and if it be a maternal inheritance, the mother; and it will pass to his or her eldest brother of the whole blood or his descendants, and the other brothers in succession and their descendants; and, if none such, to sisters of the whole blood and their descendants, in equal shares as before; in failure of this line, the next more remote ancestor on the same side is made the stock in the same manner, and then the next more remote, and so on; the rule being still observed, that the paternal line has the preference in ascending from the first purchaser, and that, up to the first purchaser, the inheritance must be traced back through the line of ancestors by which it descended. If heirs in the pure male line ascending from the first purchaser should fail, then, in compliance with a rule above stated, a female ancestor, or some ancestor of a female ancestor, is to be made the stock; and first, it is a rule that such female ancestor is to be taken on the paternal side, if any such can be found; and therefore the brother of the paternal grandmother (the father's mother) is preferred to the brother of the mother of the deceased proprietor, he having been the first purchaser.

Here sometimes, though rarely, occurs a point about which a difference of opinion has existed for a long series of years. According to some authorities, when a female stock on the paternal side is to be introduced, proximity of blood is to have the preference, and consequently collateral relations of the paternal grandmother are to be preferred to collated relations of the paternal great grandmother; according to other authorities (and this is the doctrine maintained by Mr. Justice Blackstone in his Commentaries), the pedigree is still to be traced up as far as possible on the paternal side through males, and the female ancestor of the remotest male ancestor is to be preferred as a stock to the female ancestor of a less remote male ancestor, the paternal great grandmother to the paternal grandmother.

On failure of relations on the paternal side of the first purchaser, the maternal line is let in, that is, the mother of the first purchaser is considered as the stock, and her ancestors, first on the paternal, and then on the maternal side, as before. It is to be observed, that, on failure of heirs of the last proprietor on the side of the first purchaser, the estate does not pass to the heirs of the last proprietor on the other side, but escheats as before, so that an estate descended to the deceased proprietor from his mother can never pass to his collateral relations on the father's side. It has been laid down in the above statement, that collateral relations, in order to be let in to inherit, must be of the whole blood of the person from or through whom they are to derive their claim. Thus, a brother of the deceased proprietor by the same father, but a different mother, cannot inherit to the deceased proprietor, whether he took by purchase or descent. The estate will rather escheat; and the same is the case with an uncle, half brother of the father, and so on: this rule, like that which excludes the lineal ancestor, has long been felt to rest on no sound principle, and to be hard in its operation.

shall in this act, except where the nature of the provision, or the context of the act, shall exclude such construction, be interpreted as follows; (that is to say), the word "land" shall extend to manors, advowsons, messuages, and all other

3 & 4 W. 4, c. 106.

"Land."

We think that both these rules may be taken away, without introducing any uncertainty into the law of inheritance, or materially impairing its symmetry.

AND 1st. AS TO THE ASCENDING LINE.

It appears desirable that the lineal ancestor should be let in to the succession in such order as to infringe as little as possible on the present rules, and to found the new rule upon some principle already established, making it agreeable, so far as may be, to the feelings of the people, and to the general policy of the law of inheritance. This, we think, may best be done, by introducing the ancestor wherever the descendants of such ancestor would be entitled, according to the present rules: the ascending line would thus come in immediately after the descending. If the purchaser of an estate died without issue, and intestate, leaving a father, that father would take before the brothers or sisters, or their descendants; and, if there were neither father, nor brothers, or sisters, or their descendants, a surviving grandfather would take before uncles or aunts. Conformity in the laws regulating different species of property is desirable, with a view to the better general understanding of the law; accordingly, one recommendation of this rule is, that it would make the transmission of real property, in one case, conformable to the law now long established for the transmission of personal property, which, in case of the intestacy of a person dying unmarried and without issue, goes exclusively to the father as next of kin; a law which it is believed has not been found inconvenient, nor considered unfair or objectionable. The father, too, as the general dispenser of the family property, seems the fittest person to have the control over whatever is to devolve by law upon some part of his family.

By a technical rule of pleading, the descent from one brother or sister to another, has been hitherto considered immediate, and in the opinion of some persons, it would be better to consider that as a substantial rule, and to prefer brothers and sisters to the father; this, however, would be introducing an anomaly, especially if the principle were not followed up by postponing generally the ancestor to his descendants, the grandfather for instance to the uncle. It may be argued, in support of such proposal, that the ancestor who is likely to be advanced in life, may be expected to be less capable of making a discreet disposition of the property, that he may be tempted unfairly to divert it to his issue by a different marriage, or even to make some disposition altogether capricious and unreasonable; but the dependence of children on their parents is acknowledged to be salutary; and, when it is considered that the proposed change of the law will only come into operation in the absence of express disposition, and therefore, it may be presumed, for the most part, where no strong reason was felt by the deceased proprietor for making a disposition, the general good of the family seems likely to be best consulted by vesting the property in its head, rather than in any of the younger members; and, as already observed, less violence will thus be done to the general system of the law of inheritance.

3 & 4 W. 4, c. 106.

hereditaments, whether corporeal or incorporeal, and whether freehold or copyhold; or of any other tenure, and whether descendible according to the common law, or according to the custom of gavelkind or borough-english, or any other

The same reasons, we consider, should prevail against a plan, which has been proposed, of giving to the ancestor an interest during his life only.

2. AS TO THE HALF BLOOD.

We think it advisable that no distinction should exist between the whole and the half blood, except that preference should be given to the whole blood of the first purchaser, as between his kindred in equal degree, or their descendants, with the exception of a single case afterwards mentioned. The following reasons seem to us sufficient for putting the whole blood and the half blood on an equal footing, with the above exception:

1. One ancestor only of any couple of ancestors being the person from or through whom the inheritance descends, it seems needless to have any regard to the other ancestor. Thus, if land descend from the father to the eldest son, there seems no reason why it should not pass from him to the second son, whether born of the same or another mother.

2. The rule is recommended by the principle of conformity already suggested, as, in the transmission of personal estate, the whole blood and half blood stand on an equal footing, and so in case of descent of a title of nobility, or of an estate tail.

3. The difference between the whole and the half blood, however well understood by lawyers, is, it is believed, not familiar to the public; lands are, therefore, liable to be left to descend contrary to the intention of the owner, and they are liable to be claimed and to be possessed contrary to the law, without an evil intention; and further, in deducing the title on sales of estates, the circumstance of the half blood, being not of very frequent occurrence, is liable to be overlooked by those who prepare the abstract of title, and by those who know nothing of the pedigree but what is laid before them; and thus a bad title may be approved of by the advisers of a purchaser for valuable consideration, and accepted by him; whatever leads to insecurity of titles is, of course, independently of other considerations, greatly objectionable.

Some of the above reasons apply with equal force to the case in which the person who died seised was himself the purchaser.

The reason which has inclined us to give a limited preference to the whole blood in this case is, that, when one parent has issue by another marriage, the connection between the members of the two families is felt to be much less than between the members of each family. If a brother leave a whole brother or sister, or the issue of either of these, and also an elder brother by a different marriage, it would be repugnant to common feelings and notions to direct his estate to descend to the half brother, although, if he left a brother or sister of the half blood, or the issue of such, and only a more remote relation of the whole blood, the proximity of kindred would seem to give a reasonable preference to the former. It would be desirable, if, with reference to the half blood, a distinction could be drawn between the case of a purchaser by his own act, according to the familiar use of the word purchaser, and that of a purchaser in the mere

custom, and to money to be laid out in the purchase of land, and to chattels, and other personal property transmissible to heirs, and also to any share of the same hereditaments and properties, or any of them, and to any estate 3 & 4 W. 4, c. 106.

technical sense of the word, that is, a person who may have succeeded perhaps to the family estate, but is considered as a purchaser because it comes to him through some deed or will, and not by inheritance; and in the latter case to put the whole and the half blood on an equal footing: it is considered, however, impracticable to frame a law founded on this distinction, which should be clear and simple, except, indeed, that a power may be given to the person from whom the property comes, of directing that it shall be taken as if it descended from a particular line of ancestors as hereafter explained, in which case we think the distinction of the whole and half blood may also be taken away.

It is proposed, therefore, that the whole blood of the first purchaser, who took without reference to any ancestor, shall be preferred, as between persons claiming through the same ancestor of the first purchaser, to the half blood, and that, subject to this preference, the distinction between the whole and the half blood shall be abolished.

3. AS TO THE FEMALE ANCESTOR.

With respect to the question as to the preference of the nearer or more remote female ancestor on the paternal side, the case having, it is understood, occurred more than once since the Commentaries were published, it seems expedient to settle it: and the symmetry of the rules of inheritance appears most consulted by adopting the rule laid down by Mr. Justice Blackstone. It is proposed to declare this to be the law, and to extend it, of course, to the case of direct ascent, so that the mother of the paternal grandfather would be preferred to the mother of the father. Four tables are subjoined, one showing the present order of inheritance as laid down by Mr. Justice Blackstone; the others, showing the order of inheritance according to the proposed alterations.

4. LIMITATION TO SPECIAL HEIRS.

The rule above mentioned, which directs, that, where the inheritance passes to collateral relations of the last proprietor, those only are admitted to take, who are of the blood of the first purchaser, occasioning an estate to pass sometimes in a different channel, where the deceased owner had inherited the estate, and where he had acquired it by what the law denominates purchase, although the distinction is often, as has already been observed, only technical, introduces complexity, and sometimes causes anomalous diversities in the transmission of estates. Thus, if a person acquired an estate immediately under a will or settlement made by his maternal ancestor, that estate would descend to his relations on the father's side, and would not return to the family from which it came, until the father's line were exhausted. On the other hand, if it came from a maternal ancestor by descent, strictly so called, all the relations on the paternal side would be excluded, and, rather than pass to them, the estate would escheat. In consequence again of a principle of courts of equity, that a man cannot be a trustee for himself, and that, where the beneficial estate is in the same party with the legal estate, it is absorbed by the latter, cases have oc-

3 & 4 W. 4, c. 106.

of inheritance, or estate for any life or lives, or other estate transmissible to heirs, and to any possibility, right, or title of entry or action, and any other interest capable of being inherited, and whether the same estates, possibilities,

curred where the course of descent of an inherited estate, the title to which was equitable, has been changed by the accident of the mere legal estate (that is, what may be called the *fictitious* estate of the trustee) descending from the other line of ancestors, and absorbing the equitable estate. An additional inconvenience arises from the occasional nicety of the distinction between strict descent and purchase, according to the technical sense of the latter word, a circumstance which sometimes makes the channel of descent a matter of question. It has been proposed to remedy these inconveniences, by considering every person who dies owner of an estate of fee simple, as the stock from whom alone the inheritance is to be traced as if he had been first purchaser. It is apprehended, however, that such a rule would occasionally produce very objectionable consequences. Thus, if an heiress died under age, leaving a child who should also die under age, and without issue, the estate would necessarily be carried from her family to the family of her husband. This proposal, therefore, is not recommended as a general rule.

It has, however, occurred to us, that a person devising or settling an estate in fee simple, might be allowed to direct that the donee or devisee should take the estate as if it had come to him from a particular ancestor, that an estate for instance might be given to a man and his heirs on the part of his mother. The attempt to create limitations of this nature has been frequently made; the law now forbids such limitations in grants of estates in fee simple, although it allows them on the creation of estates tail. We incline to the opinion that allowing them in the former case would be a reasonable enlargement of the power of absolute proprietors, and would diminish the inconveniencies produced by the technical distinction between inheritance and purchase. This is the case in which we think the distinction between the whole blood and half blood of the purchaser may be abolished.

We think that especial regard should be paid to the blood of the first purchaser in a case which will be liable to occur in consequence of the admission of the half blood to inherit. If an estate should descend from a purchaser to his half brother, it might happen that the heirs of the second brother would be strangers in blood to the first, and the heirs of the first brother (at the death of the second) strangers in blood to the second; this would be the case if the common parent were illegitimate, and the second brother should die without issue, and there were no other brother or sister, or the issue of such; and it might be the case under other circumstances. We propose to provide for the case by directing the inheritance to pass to the heir of the first purchaser, when the heir of the last proprietor shall not be also heir of the first purchaser. We further think that the last proprietor may be treated as if he had been first purchaser, in the rare case in which the line from which the estate descended to the last proprietor has failed, for the purpose of admitting to the inheritance his other relations, rather than let it escheat. It may seem superfluous to

rights, titles, and interests, or any of them, shall be in possession, reversion, remainder, or contingency; and the words, "the purchaser," shall mean the person who last acquired the land otherwise than by descent, or than by any escheat, partition, or inclosure, by the effect of which the land shall have become part of or descendible in the same manner as other land acquired by descent; and the word, "descent" shall mean the title to inherit land by reason of consanguinity, as well where the heir shall be an

3 & 4 W. 4, c. 106.

"The purchaser."

"Descent."

legislate for cases like these, which may appear very unlikely to occur in practice; they are found, however, to occur in consequence of the acquisition of estates by persons of illegitimate birth who have in law no relations but their own descendants, or by the descendants of such, and in consequence of the loss of evidence of pedigree in families of mean condition or origin.

5. Seisin of Ancestor.

A rule of law, founded on feudal principles, and expressed in the legal maxim, seisina facit stipitem, directs that inheritance is to be traced from the person who last died actually seised, that is, who was in possession, by himself, or a tenant for years, or had received some rent (in the case of a freehold lease), or had exercised some act of ownership; thus, if the right to an estate descended to a person who himself died without having taken possession, or having had it by construction of law, the inheritance is to be traced, not from such person, but from the person who died possessed. This law produces many anomalous consequences; it makes it sometimes a matter of chance whether a whole sister or a half brother of the person who last died entitled, or whether a father, or an uncle, or more remote relation of the person who last actually enjoyed the property, shall inherit; and it may happen that one part of a family estate, having been in the occupation of a tenant, shall go one way, another part, as to which the possession may have remained vacant during the time of the person last entitled, shall go another way. Owing to the circumstances that some species of property, as, reversions and advowsons, do not admit of taking actual possession, though an act of ownership has the effect of taking possession, and that, on the other hand, in most cases which admit of possession, and as to equitable estates, the law creates constructive possession, these anomalies are sometimes inevitable; moreover, occasionally nice and doubtful questions arise as to the fact of actual or constructive possession. The rule itself appears not to be grounded on any solid principle; and, though the inconveniencies arising from it will be lessened by admitting the half blood and the lineal ancestor to inherit, it is proposed to abolish it, and to enact that estates shall pass to the heirs of the person who last died entitled, although he may not have had seisin.

It appears expedient to extend all the above proposed rules to the inheritance of lands held by tenures or customs different from the general tenure of free and common socage, as copyhold lands and customary freeholds, and lands held in ancient demesne, and borough english and gavelkind lands, and also to descendible freeholds.—1st Rep. pp. 9—18.

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ancestor or collateral relation, as where he shall be a child or other issue; and the expression, "descendants" of any ancestor shall extend to all persons who must trace their descent through such ancestor; and the expression, "the person last entitled to land," shall extend to the last person who had a right thereto, whether he did or did not obtain the possession or the receipt of the rents and profits thereof; and the word, "assurance," shall mean any deed or instrument (other than a will) by which any land shall be conveyed or transferred at law or in equity; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

"Descendants."

"Person last entitled."

"Assurance."

Number and gender.

Descent shall always be traced from the purchaser, but the last owner shall be considered to be the purchaser, unless the contrary be proved.

II. And be it further enacted, That, in every case, descent shall be traced from the purchaser; and to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require, the person last entitled to the land shall, for the purposes of this act, be considered to have been the purchaser thereof, unless it shall be proved that he inherited the same; in which case, the person from whom he inherited the same shall be considered to have been the purchaser, unless it shall be proved that he inherited the same; and, in like manner, the last person from whom the land shall be proved to have been inherited shall, in every case, be considered to have been the purchaser, unless it shall be proved that he inherited the same.

Heir entitled under a will shall take as devisee, and a limitation to the grantor or his heirs shall create an estate by purchase.

III. And be it further enacted, That, when any land shall have been devised by any testator who shall die after the thirty-first day of December, one thousand eight hundred and thirty-three, to the heir or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee, and not by descent; and, when any land shall have been limited by any assurance executed after the said thirty-first day of December, one thousand eight hundred and thirty-three, to the person or to the heirs of the person who shall thereby have conveyed the same land, such person shall be con-

sidered to have acquired the same as a purchaser by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate, or part thereof. 3 & 4 W. 4, c. 106.

IV. And be it further enacted, That, when any person shall have acquired any land by purchase under a limitation to the heirs, or to the heirs of the body of any of his ancestors, contained in an assurance executed after the said thirty-first day of December, one thousand eight hundred and thirty-three, or under a limitation to the heirs or to the heirs of the body of any of his ancestors, or under any limitation having the same effect contained in a will of any testator who shall depart this life after the said thirty-first day of December, one thousand eight hundred and thirty-three, then and in any of such cases such land shall descend, and the descent thereof shall be traced as if the ancestor named in such limitation had been the purchaser of such land. Where heirs take by purchase under limitations to the heirs of their ancestor, the land shall descend as if the ancestor had been the purchaser

V. And be it further enacted, That no brother or sister shall be considered to inherit immediately from his or her brother or sister, but every descent from a brother or sister shall be traced through the parent. Descent of brothers, &c., how traced.

VI. And be it further enacted, That every lineal ancestor shall be capable of being heir to any of his issue; and in every case where there shall be no issue of the purchaser, his nearest lineal ancestor shall be his heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor, so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue, other than a nearer lineal ancestor or his issue. Lineal ancestor may be heir in preference to collateral persons claiming through him.

VII. And be it further enacted and declared, That none of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting until all his paternal ancestors and their descendants shall have failed; and also that no female paternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male paternal ancestors and their descendants shall have failed; The male line to be preferred.

3 & 4 W. 4, c. 106.

and that no female maternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male maternal ancestors and their descendants shall have failed.

The mother of more remote male ancestor to be preferred to the mother of the less remote male ancestor.

VIII. And be it further enacted and declared, That, where there shall be a failure of male paternal ancestors of the person from whom the descent is to be traced, and their descendants, the mother of his more remote male paternal ancestor, or her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male paternal ancestor, or her descendants; and where there shall be a failure of male maternal ancestors of such person, and their descendants, the mother of his more remote male maternal ancestor, and her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male maternal ancestor, and her descendants.

Half blood, if on the part of a male ancestor, to inherit after the whole blood of the same degree; if on the part of a female ancestor, after her.

IX. And be it further enacted, That any person related to the person from whom the descent is to be traced by the half blood, shall be capable of being his heir; and the place in which any such relation by the half blood shall stand in the order of inheritance, so as to be entitled to inherit, shall be next after any relation in the same degree of the whole blood, and his issue, where the common ancestor shall be a male, and next after the common ancestor where such common ancestor shall be a female; so that the brother of the half blood on the part of the father shall inherit next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half blood on the part of the mother shall inherit next after the mother.

After the death of a person attainted, his descendants may inherit.

X. And be it further enacted, That, when the person from whom the descent of any land is to be traced shall have had any relation who, having been attainted, shall have died before such descent shall have taken place, then such attainder shall not prevent any person from inheriting such land who would have been capable of inheriting the same, by tracing his descent through such relation, if he had not been attainted, unless such land shall have escheated in consequence of such attainder before the first

day of January, one thousand eight hundred and thirty-four. 3 & 4 W. 4, c. 106

XI. And be it further enacted, That this act shall not extend to any descent which shall take place on the death of any person who shall die before the said first day of January, one thousand eight hundred and thirty-four. Act not to extend to any descent before Jan. 1834.

XII. And be it further enacted, That, where any assurance executed before the said first day of January, one thousand eight hundred and thirty-four, or the will of any person who shall die before the same first day of January, one thousand eight hundred and thirty-four, shall contain any limitation or gift to the heir or heirs of any person, under which the person or persons answering the description of heir, shall be entitled to an estate by purchase, then the person or persons who would have answered such description of heir, if this act had not been made, shall become entitled, by virtue of such limitation or gift, whether the person named as ancestor shall or shall not be living on or after the said first day of January, one thousand eight hundred and thirty-four. Limitations made before the 1st Jan. 1834, to the heirs of a person then living, shall take effect as if the act had not been made.

3 & 4 WILL. IV. CAP. CV.

An Act for the Amendment of the Law relating to Dower(b).

[29th August, 1833.]

3 & 4 W. 4, c. 105.

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal and Commons in this present parliament assembled, and by the authority of the same, That the words

Meaning of the words in the act:

(b) The present law of dower gives to a surviving wife a right to have assigned to her for her life, one-third of all the lands and hereditaments (with a few exceptions, such as common *sans nombre* and personal annuities) of which her husband was seised in law (that is, had the legal property by descent, there being at the same time no possession) or in fact for an estate of inheritance in possession at any time during the marriage, notwithstanding any alienation or disposition which the husband may have made of the estates, or any part of them. It does not give dower out of lands to which the husband had a right, but of which he had not seisin in law or in fact. The widow is not entitled to take possession of any land for her dower; the assignment is to be made by the heir; and, if he neglect it, or do it unfairly, she can compel a just assignment by legal process, and generally recover compensation for the detention. This law appears well adapted to the state of freehold property which existed at the time when it was established, and during a long period afterwards. Alienation was at first prohibited, and it long remained rare. A disposition by will, except as to estates, in a few districts, devisable by custom, was not allowed; so that, the estate of the husband descending of course to his heir, there was not likely to be any difficulty in finding the lands a share of which was to be assigned, nor any interference with the property of third persons, in making the assignment; besides all which, there was no fund for maintaining the widow but the real estate. This state of things has for a long period been so much changed as to make the original law of dower highly inconvenient. Estates are now frequently conveyed away and charged by the husband, and it is desirable that there should be a power of so doing free from the burden of dower. The great increase, too, of personal property, affords other means of providing for widows.

The legislature long since, by the statute 27 Hen. 8, c. 10, provided a method of diminishing the evil to some extent, by making a jointure of a certain description, given before marriage, a bar of the right of dower, though such jointure may be of inadequate value, and made to the wife before she has arrived at the age at which she is enabled to assent to such provision. Courts of equity have enlarged the remedy, by making some provisions not strictly within the terms of the statute bars of dower.

and expressions herein-after mentioned, which in their ordinary signification have a more confined or a different 3 & 4 W. 4, c. 105.

Courts of equity have also obviated the inconveniences arising from dower, and also very materially restricted and impaired the right to dower, by holding that equitable estates, a modification of the ownership of real property which has been introduced since the law of dower was established, and now exists to a very great extent, are not subject to dower; and further, by holding that a purchaser may protect himself against the dower of the vendor's wife, in legal estates, by procuring the assignment to a trustee for himself of an outstanding legal term, (in reality a mere fictitious estate), decisions scarcely reconcilable with principles of justice (as they make the rights of parties liable to be affected by technical rules and fictions); and, contrary to a general principle laid down with respect to equitable estates, —that equity shall follow the law— and at variance with the principle of decisions in the analogous case of the husband's tenancy by the curtesy, which is held to attach to equitable estates.

It may be observed here, that the statutable bar by jointure depends at law, and, in case of the marrige of a female under twenty-one years, in equity also, on the validity of the title to the jointure. It is, therefore, troublesome in questions with purchasers.

In order to defeat the right of dower, in cases not within the statute, and to which the above decisions would not apply, purchasers have long had recourse to the contrivance of taking conveyances of estates in a very artificial form, called a conveyance to uses to bar dower, which, while it confers the whole beneficial ownership, and an absolute dominion over the legal estate, prevents the legal estate from so vesting in the purchaser as to make the property subject to his wife's dower. This ingenious form of conveyance, which was long in being perfected, and is now nearly universal, is found in practice to be attended with some inconveniences, and, owing to the mistakes of unskilful practitioners, it occasionally leads to serious mischiefs.

By all these means the law of dower is, in most instances, evaded. Where husbands find their estates subject to dower, they very frequently make provision for their widows on the condition of their relinquishing their dower; and sometimes, without knowing that the right to dower exists, or without expressly noticing it, they make provisions for their widows, and at the same time make dispositions of their fee-simple estates inconsistent with the enjoyment of dower by the widow, or which, by clear implication, indicate that dower is not meant to be enjoyed by the widow.

These last modes of defeating dower are found to be, from various causes, very uncertain, and often open to questions; and they are not unfrequent sources of litigation, in which the widow finds herself involved, or is tempted, by the uncertainty of the law, to engage.

The general result is, that the right to dower exists beneficially in so few instances that it is of little value, considered as a provision for widows; and we believe it may be confidently asserted that it is never calculated on as a provision by females who contract marriage, or their friends; yet there is so much of uncertainty in the modes by which dower is prevented, that the actual or possible existence of the right is a very frequent and serious impediment to the transfer of property, and the ascertaining in each case that

3 & 4 W. 4, c. 105.

meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such con-

it does not exist in the widows of any of the persons through whom the property has passed, or procuring the necessary acts to be done for preventing or barring it where it does or may exist, or securing the future production of the evidence of its non-existence, are the causes of frequent and great delay and expense attending such transfers. Thus, where there is no person who can derive any benefit from the law of dower, that law exists often as a clog to the transfer of property; sometimes as a legal pretext for delaying the performance of a contract, and sometimes as the inevitable cause of, or as a mischievous temptation to, litigation. Generally, we conceive that the right to dower may be said to exist to a great extent to the injury of proprietors and purchasers, and to a comparatively small extent for the benefit of widows, and to some extent also to their injury, in leading them into, or involving them in, litigation.

The true principle, as we think, on which the law of dower was originally established, and on which it has a claim on grounds of justice and policy (without sacrificing the general convenience) to be supported, is, that it should be considered as that interest in an estate of inheritance which the law takes from the heir of a deceased proprietor for the support of his widow, whose claims, in natural justice and policy, appear to stand at least on an equal footing with the claims of the heir. It is so far analogous to the provision which a law established in more modern times has made for the widow out of the husband's personal estate undisposed of by his will. By combining this principle with another of high and perhaps paramount importance, a principle which the law has carefully established, almost to its fullest extent, viz. that a right of alienation should be inseparably incident to property of every description, we think that the law of dower may be put on a footing more beneficial, on the whole, to widows, and free from nearly all the present inconveniences and mischiefs. The distinction as to dower between the husband's seisin and his mere right, we think, in the present state of things, irrational.

We propose that dower should attach upon all estates of inheritance in possession, excepting the species of property to which dower is not incident; and on property considered in equity as real estate of or to which any husband dies seised or entitled in fact or in law, whether legally and beneficially, or beneficially only, which, if belonging to the wife, would be subject to the husband's curtesy, but subject, like the interest of other persons having partial interests in the inheritance, to any estates, charges, or incumbrances which the husband may have lawfully created, or bound himself to create, and to his debts, so far as they attach on his freehold estates, and as to estates which he can affect by his will, to any disposition, direction, or declaration made by his will, executed so as to affect freehold estate; and that dower should not attach on any other estate.

By this enactment, the artificial distinction between legal and equitable estates will be taken away. On the other hand, the subtle contrivances to which we have referred, will become unnecessary.

We propose that a provision made by will for a widow out of personal estates, shall not deprive her of dower, unless the will expressly or by clear

struction, be interpreted as follows; that is to say, the word "land" shall extend to manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal (except such as are not liable to dower), and to any share thereof; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing. 3 & 4 W. 4, c. 105. "Land." Number.

II. And be it further enacted, That, when a husband shall die beneficially entitled to any land for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable, or partly Widows to be entitled to dower out of equitable estates.

implication shall so direct; but that any devise of freehold estate shall be held to be free from dower, unless the contrary be declared. And that, as to estates which the husband might by his will dispose of against his wife's right to dower, he may by his will, duly executed, declare that such right shall be discharged without making any further disposition. And we propose that the enactments shall not interfere with the rule of courts of equity, giving widows a preference over other legatees for legacies given to them in satisfaction of dower. And we propose that a declaration in any deed or instrument giving or devising estates of inheritance, may make the estate of the donee or devisee not subject to his wife's dower; but these enactments not to prevent courts from enforcing, on equitable principles, covenants or agreements of husbands not to bar the right to dower, nor to prevent the barring of dower by agreement or settlement, or its forfeiture by adultery.

Owing to the inconveniences of the legal remedies for dower, it has only been enforced in modern times by a suit in equity. This species of suit, on account of the complication of interests in the property, is very frequently tedious and expensive. We endeavoured to devise some method of giving to the wife her dower in a form which might put her in possession without legal process; and the mode of a rent-charge, and that of making the wife tenant in common of the lands out of which she was dowable, occurred to us. After anxious consideration, we arrived at the conclusion, that no benefit could be secured to widows by any such expedient, without hazarding injury much more than commensurate to other parties interested in the lands, and endangering an increase of litigation. We yet hope that some improvement of the compulsory methods of effectuating the right to dower will be found practicable. There are some antiquated species of dower, as, dower ad ostium ecclesiæ, and dower ex assensu patris, now entirely out of use. These in substance are very imperfect modes of settlement for barring the common law right to dower: we propose to abolish them.

We not propose, at present, to extend the alterations of the law of dower to gavelkind lands or borough-english lands, or to copyhold or customary lands, as to all which the right to dower or free bench is regulated by a variety of peculiar customs. We deem it expedient to postpone the recommendation of any further alteration of the laws relating to those several tenures, until the whole subject shall come under our view.—1st Rep. pp. 19—24.

3 & 4 W. 4, c. 105.

legal and partly equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession (other than an estate in jointenancy), then his widow shall be entitled in equity to dower out of the same land.

Seisin shall not be necessary to give title to dower.

III. And be it further enacted, That, when a husband shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered possession thereof, she shall be entitled to dower out of the same although her husband shall have recovered possession thereof; provided that such dower be sued for or obtained within the period during which such right of entry or action might be enforced.

No dower out of estates disposed of.

IV. And be it further enacted, That no widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime, or by his will.

Priority to partial estates, charges, and specialty debts.

V. And be it further enacted, That all partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts, and engagements to which his land shall be subject or liable, shall be valid and and effectual as against the right of his widow to dower.

Dower may be barred by a declaration in a deed;

VI. And be it further enacted, That a widow shall not be entitled to dower out of any land of her husband when in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land.

or by a declaration in the husband's will.

VII. And be it further enacted, That a widow shall not be entitled to dower out of any land of which her husband shall die wholly or partially intestate when by the will of her husband, duly executed for the devise of freehold estates, he shall declare his intention that she shall not be entitled to dower out of such land, or out of any of his land.

Dower shall be subject to restrictions.

VIII. And be it further enacted, That the right of a widow to dower shall be subject to any conditions, restrictions, or directions which shall be declared by the will of her husband, duly executed as aforesaid.

Devise of real estate *to the widow*

IX. And be it further enacted, That, where a husband shall devise any land out of which his widow would be en-

titled to dower if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband, unless a contrary intention shall be declared by his will. 3 & 4 W. 4, c. 105. shall bar her dower.

X. And be it further enacted, That no gift or bequest made by any husband to or for the benefit of his widow of or out of his personal estate, or of or out of any of his land not liable to dower, shall defeat or prejudice her right to dower, unless a contrary intention shall be declared by his will. Bequest of personal estate to the widow shall not bar her dower.

XI. Provided always, and be it further enacted, That nothing in this act contained shall prevent any court of equity from enforcing any covenant or agreement entered into by or on the part of any husband not to bar the right of his widow to dower out of his lands, or any of them. Agreement not to bar dower may be enforced.

XII. And be it further enacted, That nothing in this act contained shall interfere with any rule of equity, or of any ecclesiastical court, by which legacies bequeathed to widows in satisfaction of dower, are entitled to priority over other legacies. Legacies in bar of dower still entitled to preference.

XIII. And be it further enacted, That no widow shall hereafter be entitled to dower ad ostium ecclesiæ, or dower ex assensu patris. Certain dowers abolished.

XIV. And be it further enacted, That this act shall not extend to the dower of any widow who shall have been or shall be married on or before the first day of January, one thousand eight hundred and thirty-four, and shall not give to any will, deed, contract, engagement, or charge, executed, entered into, or created before the said first day of January, one thousand eight hundred and thirty-four, the effect of defeating or prejudicing any right to dower. Act not to take effect before the 1st January, 1834.

3 & 4 WILL. IV. CAP. CIV.

An Act to render Freehold and Copyhold Estates Assets for the payment of Simple and Contract Debts.

[29th August, 1833.]

3 & 4 W. 4, c. 104.

WHEREAS it is expedient that the payment of the debts of all persons should be secured more effectually than is done by the laws now in force: Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal and Commons in this present parliament assembled, and by the authority of the same, That, from and after the passing of this act, when any person shall die seised of or entitled to any estate or interest in lands, tenements, or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customaryhold, or copyhold, which he shall not by his last will have charged with or devised subject to the payment of his debts, the same shall be assets to be administered in courts of equity for the payment of the just debts of such persons, as well debts due on simple contract as on specialty; and that the heir or heirs at law, customary heir or heirs, devisee or devisees of such debtor, shall be liable to all the same suits in equity, at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as the heir or heirs at law, devisee or devisees of any person or persons who died seised of freehold estates, was or were before the passing of this act liable to in respect of such freehold estates, at the suit of creditors by specialty in which the heirs were bound: Provided always, that, in the administration of assets by courts of equity, under and by virtue of this act, all creditors by specialty, in which the heirs are bound, shall be paid the full amount of the debts due to them before any of the creditors by simple contract or by specialty in which the heirs are not bound shall be paid any part of their demands.

Freehold and copyhold estates in all cases to be assets for payment of simple contract or specialty debts.

3 & 4 WILL. IV. CAP. XLII.

An Act for the further Amendment of the Law, and the better Advancement of Justice.

[14th August, 1833.]

WHEREAS it would greatly contribute to the diminishing of expense in suits in the superior courts of common law at Westminster, if the pleadings therein were in some respects altered, and the questions to be tried by the jury left less at large than they now are, according to the course and practice of pleading in several forms of action; but this cannot be conveniently done otherwise than by rules or orders of the judges of the said courts from time to time to be made, and doubts may arise as to the power of the said judges to make such alterations without the authority of parliament: Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal and Commons in this present parliament assembled, and by the authority of the same, That the judges of the said superior courts, or any eight or more of them, of whom the chiefs of each of the said courts shall be three, shall and may, by any rule or order to be from time to time by them made, in term or vacation, at any time within five years from the time when this act shall take effect, make such alterations in the mode of pleading in the said courts, and in the mode of entering and transcribing pleadings, judgments, and other proceedings in actions at law, and such regulations as to the payment of costs, and otherwise for carrying into effect the said alterations, as to them may seem expedient; and all such rules, orders, or regulations shall be laid before both houses of parliament, if parliament be then sitting, immediately upon the making of the same, or, if parliament be not sitting, then within five days after the next meeting thereof, and no such rule, order, or regulation shall have effect until six weeks after the same shall have been so laid before both houses of parliament;

3 & 4 W. 4, c. 42.

Judges to have power to make alterations in the mode of pleading in the superior courts, &c.

3 & 4 W. 4, c. 42.

and any rule or order so made shall, from and after such time aforesaid, be binding and obligatory on the said courts and all other courts of common law, and on all courts of error into which the judgments of the said courts or any of them shall be carried by any writ of error, and be of the like force and effect as if the provisions contained therein had been expressly enacted by parliament: Provided always, that no such rule or order shall have the effect of depriving any person of the power of pleading the general issue, and giving the special matter in evidence, in any case wherein he is now or hereafter shall be entitled to do so by virtue of any act of parliament now or hereafter to be in force.

Not to deprive any person of the power of pleading the general issue.

Executors may bring actions for injuries to the real estates of the deceased;

II. And whereas there is no remedy provided by law for injuries to the real estate of any person deceased (*a*) committed in his lifetime, nor for certain wrongs done by a person deceased in his lifetime to another in respect of his property, real or personal; for remedy thereof be it enacted, That an action of trespass, or trespass on the case, as the case may be, may be maintained by the executors or administrators of any person deceased, for any injury to the real estate of such person, committed in his lifetime, for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such action shall be brought within one year after the death of such person; and the damages, when recovered, shall be part of the personal estate of such person; and further, that an action of trespass, or trespass on the case, as the case may be, may be maintained against the executors or administrators of any person deceased, for any wrong committed by him in his lifetime to another, in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executors or

and actions may be brought against executors for an injury to property, real or personal, by their testator.

(*a*) Upon the construction of the 4 Geo. 3, c. 7, executors could maintain an action *ex delicto* for almost every species of injury to *personal* property committed in the lifetime of the testator; but, for injuries to *real* property, committed in the lifetime of the owner, neither heirs or devisees, executors or administrators, could sue.

administrators shall have taken upon themselves the administration of the estate and effects of such person; and the damages to be recovered in such action shall be payable in like order of administration as the simple contract debts of such person. 3 & 4 W. 4, c. 42.

III. And be it further enacted, That all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or scire facias upon any recognizance, and also all actions of debt upon any award where the submission is not by specialty, or for any fine due in respect of any copyhold estates, or for an escape, or for money levied on any fieri facias, and all actions for penalties, damages, or sums of money given to the party grieved by any statute now or hereafter to be in force, that shall be sued or brought at any time after the end of the present session of parliament, shall be commenced and sued within the time and limitation herein-after expressed, and not after; that is to say, the said actions of debt for rent upon an indenture of demise, or covenant or debt upon any bond or other specialty, actions of debt or scire facias upon recognizance, within ten years after the end of this present session, or within twenty years after the cause of such actions or suits, but not after; the said actions by the party grieved, one year after the end of this present session, or within two years after the cause of such actions or suits, but not after; and the said other actions within three years after the end of this present session, or within six years after the cause of such actions or suits, but not after; provided that nothing herein contained shall extend to any action given by any statute where the time for bringing such action is or shall be by any statute specially limited. Limitation of action of debt on specialties, &c.

IV. And be it further enacted, That, if any person or persons that is or are or shall be entitled to any such action or suit, or to such scire facias, is, or are, or shall be, at the time of any such cause of action accrued, within the age of twenty-one years, feme covert, non compos mentis, or beyond the seas, then such person or persons shall be at liberty to bring the same actions, so as they commence the same within such times after their coming to or being of full age, discovert, of Remedy for infants, femes covert, &c.

3 & 4 W. 4, c. 42.

sound memory, or returned from beyond the seas, as other persons having no such impediment should, according to the provisions of this act, have done; and that, if any person or persons against whom there shall be any such cause of action is, or are, or shall be, at the time such cause of action accrued, beyond the seas, then the person or persons entitled to any such cause of action shall be at liberty to bring the same against such person or persons within such times as are before limited after the return of such person or persons from beyond the seas.

Absence of defendants beyond seas provided for.

Proviso in case of acknowledgment in writing, or by part payment.

V. Provided always, That, if any ackowledgment shall have been made, either by writing signed by the party liable by virtue of such indenture, specialty, or recognizance, or his agent, or by part payment or part satisfaction on account of any principal or interest being then due thereon, it shall and may be lawful for the person or persons entitled to such actions to bring his or their action for the money remaining unpaid and so acknowledged to be due, within twenty years after such acknowledgment by writing or part payment or part satisfaction as aforesaid, or, in case the person or persons entitled to such action shall at the time of such acknowledgment be under such disability as aforesaid, or the party making such acknowledgment be, at the time of making the same, beyond the seas, then within twenty years after such disability shall have ceased as aforesaid, or the party shall have returned from beyond seas, as the case may be; and the plaintiff or plaintiffs in any such action, or any indenture, specialty, or recognizance, may, by way of replication, state such acknowledgment, and that such action was brought within the time aforesaid, in answer to a plea of this statute.

The limitation after judgment or outlawry reversed.

VI. And nevertheless be it enacted, if in any of the said actions judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment the judgment be given against the plaintiff that he take nothing by his plaint, writ, or bill, or, if in any of the said actions the defendant shall be outlawed, and shall after reverse the said outlawry, That, in all such cases, the party plaintiff, his executors or administrators, as the case shall require, may commence a new action or suit from time to time within a year after such

judgment reversed, or such judgment given against the plaintiff, or outlawry reversed, and not after. 3 & 4 W. 4, c. 42.

VII. And be it further enacted, That no part of the United Kingdom of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney, and Sark, nor any islands adjacent to any of them, being part of the dominions of his Majesty, shall be deemed to be beyond the seas within the meaning of this act, or of the act passed in the twenty-first year of the reign of King James the First, intituled "An Act for Limitation of Actions, and for avoiding of Suits in Law." No part of the United Kingdom, &c. to be deemed beyond the seas within the meaning of this act.

VIII. And be it further enacted, (*b*) That no plea in abatement for the nonjoinder of any person as a co-defendant shall be allowed in any court of common law unless it shall be stated in such plea that such person is resident within the jurisdiction of the court, and unless the place of residence of such person shall be stated with convenient certainty in an affidavit verifying such plea. Restriction as to plea in abatement for non-joinder of a co-defendant.

IX. And be it further enacted, That, to any plea in abatement in any court of law of the nonjoinder of another person, the plaintiff may reply that such person has been discharged by bankruptcy and certificate, or under an act for the relief of insolvent debtors. Reply of plaintiff to plea in abatement of non-joinder.

X. And be it further enacted, That, in all cases in which after such plea in abatement the plaintiff shall, without having proceeded to trial upon an issue thereon, commence another action against the defendant or defendants in the action in which such plea in abatement shall have been pleaded, and the person or persons named in such plea in abatement as joint contractors, if it shall appear by the pleadings in such subsequent action, or on the evidence at the trial thereof, that all the original defendants are liable, but that one or more of the persons named in such plea in abatement or any subsequent plea in abatement are not liable as a contracting party or parties, the plaintiff shall nevertheless be entitled to judgment, or to a verdict and judgment, as the case may be, against the other defendant or Provision in the case of subsequent proceedings against the persons named in a plea in abatement.

(*b*) For a full exposition of the previous state of the law, and of the grounds of the enactments contained in this and the four next sections, see the 3rd Rep. of the Common Law Commissioners.

3 & 4 W. 4, c. 42.

defendants who shall appear to be liable; and every defendant who is not so liable shall have judgment, and shall be entitled to his costs as against the plaintiff, who shall be allowed the same as costs in the cause against the defendant or defendants who shall have so pleaded in abatement the nonjoinder of such person; provided that any such defendant who shall have so pleaded in abatement shall be at liberty on the trial to adduce evidence of the liability of the defendants named by him in such plea in abatement.

Misnomer not to be pleaded in abatement.

XI. And be it further enacted, That no plea in abatement for a misnomer shall be allowed in any personal action, but that, in all cases in which a misnomer would but for this act have been by law pleadable in abatement in such actions, the defendant shall be at liberty to cause the declaration to be amended, at the costs of the plaintiff, by inserting the right name, upon a judge's summons founded on an affidavit of the right name; and, in case such summons shall be discharged, the costs of such application shall be paid by the party applying, if the judge shall think fit.

Initials of names may be used in some cases.

XII. And be it further enacted, That, in all actions upon bills of exchange or promissory notes, or other written instruments, any of the parties to which are designated by the initial letter or letters or some contraction of the Christian or first name or names, it shall be sufficient in every affida- to hold to bail, and in the process or declaration, to designate such persons by the same initial letter or letters or contraction of the Christian or first name or names, instead of stating the Christian or first name or names in full.

Wager of law to be abolished.

XIII. And be it further enacted (*c*), That no wager of law shall be hereafter allowed.

(*c*) Previously to this act, an executor or administrator was not liable to be sued in debt on simple contract in the King's Bench or Common Pleas, though he was liable in the Exchequer. This grew out of the absurd and long exploded mode of trial by wager of law, by which the defendant was allowed in debt on simple contract and some other cases, to discharge himself on his own oath, and that of a certain number of compurgators swearing to their belief of his assertion. This mode of trial being inapplicable to the case of an executor or administrator, because he was charged *in auter droit*, and had to answer, not for his own contract, but that of another person, the legal inference was, that an action for debt on simple contract ought not, as against such a defendant, to be permitted; for, other-

XIV. And be it further enacted, That an action of debt on simple contract shall be maintainable in any court of common law against any executor or administrator. 3 & 4 W. 4, c. 42. Action of debt on simple contract.

XV. And whereas it is expedient to lessen the expense of the proof of written or printed documents, or copies thereof, on the trial of causes (*d*); be it further enacted, That it shall and may be lawful for the said judges, or any such eight or more of them as aforesaid, at any time within five years after this act shall take effect, to make regulations by general rules or orders, from time to time, in term or in vacation, touching the voluntary admission, upon an application for that purpose at a reasonable time before the trial, of one party to the other of all such written or printed documents, or copies of documents, as are intended to be offered in evidence on the said trial by the party requiring such admission, and touching the inspection thereof before such admission is made, and touching the costs which may be incurred by the proof of such documents or copies on the trial of the cause in case of the omitting to apply for such admission, or the not producing of such document or copies for the purpose of obtaining admission thereof, or of the refusal to make such admission, as the case may be, and as to the said judges shall seem meet; and all such rules and orders shall be binding and obligatory in all courts of common law, and of the like force as if the provisions therein contained had been expressly enacted by parliament. Power to the judges to make regulations as to the admission of written documents.

XVI. And whereas it would also lessen the expense of trials and prevent delay if such writs of inquiry as hereinafter mentioned were executed, and such issues as hereinafter mentioned were tried, before the sheriff of the county where the venue is laid; be it therefore enacted, That all writs issued under and by virtue of the statute passed in the session of parliament held in the eighth and ninth years of the reign of King William the Third, intituled 'An Act for the better preventing frivolous and vexatious suits,' shall, Writs of inquiry under the statute 8 & 9 Will. 3, c. 11, to be executed before the sheriff, unless otherwise ordered.

wise it would follow that the estate might be charged in cases where the testator hinself, if living, might have waged his law. Both wager of law and the rule in question are by this and the next section abolished.

(*d*) A very elaborate statement of the grounds of this enactment will be found in the second Report of the common law commissioners.

3 & 4 W. 4, c. 42.

unless the court where such action is pending, or a judge of one of the said superior courts, shall otherwise order, direct the sheriff of the county where the action shall be brought to summon a jury to appear before such sheriff, instead of the justices or justice of Assize or Nisi Prius of that county, to inquire of the truth of the breaches suggested, and assess the damages that the plaintiff shall have sustained thereby, and shall command the said sheriff to make return thereof to the court from whence the same shall issue at a day certain, in term or in vacation, in such writ to be mentioned; and such proceedings shall be had after the return of such writ as are in the said statute in that behalf mentioned, in like manner as if such writ had been executed before a justice of Assize or Nisi Prius.

Power to direct issues joined in certain actions to be tried before the sheriff or any judge.

XVII. And be it further enacted, That, in any action depending in any of the said superior courts for any debt or demand in which the sum sought to be recovered, and indorsed on the writ of summons, shall not exceed twenty pounds, it shall be lawful for the court in which such suit shall be depending, or any judge of any of the said courts, if such court or judge shall be satisfied that the trial will not involve any difficult question of fact or law, and such court or judge shall think fit so to do, to order and direct that the issue or issues joined shall be tried before the sheriff of the county where the action is brought, or any judge of any court of record for the recovery of debt in such county, and for that purpose a writ shall issue directed to such sheriff, commanding him to try such issue or issues, by a jury to be summoned by him, and to return such writ with the finding of the jury thereon indorsed, at a day certain, in term or in vacation, to be named in such writ; and thereupon such sheriff or judge shall summon a jury, and shall proceed to try such such issue or issues.

Upon the return of a writ of inquiry, or a trial of issues, judgment to be signed, unless, &c.

XVIII. And be it further enacted, That, at the return of any such writ of inquiry, or writ for the trial of such issue or issues as aforesaid, costs shall be taxed, judgment signed, and execution issued forthwith, unless the sheriff or his deputy before whom such writ of inquiry may be executed, or such sheriff, deputy, or judge before whom such trial shall be had, shall certify under his hand, upon such writ

that judgment ought not to be signed until the defendant shall have had an opportunity to apply to the court for a new inquiry or trial, or a judge of any of the said courts shall think fit to order that judgment or execution shall be stayed till a day to be named in such order; and the verdict of such jury, on the trial of such issue or issues, shall be as valid and of the like force as a verdict of a jury at Nisi Prius; and the sheriff, or his deputy, or judge, presiding at the trial of such issue or issues, shall have the like powers with respect to amendment on such trial as are herein-after given to judges at Nisi Prius.

Sheriff, as to such issues, to have the like powers as judges at Nisi Prius.

XIX. Provided also, That all and every the provisions contained in the statute made and passed in the first year of the reign of his present Majesty, intituled 'An Act for the more speedy judgment and execution in actions brought in his Majesty's courts of law at Westminster, and in the court of Common Pleas of the county palatine of Lancaster, and for amending the law as to judgment on a cognovit actionem in cases of bankruptcy,' shall, so far as the same are applicable thereto, be extended and applied to judgments and executions upon such writs of inquiry, and writs for the trials of issues, in like manner as if the same were expressly re-enacted herein.

Provisions of 1 W. 4, c. 7, to extend to such writs of inquiry and issues.

XX. And be it further enacted, That, from and after the first day of June one thousand eight hundred and thirty-three the sheriff of each county in England and Wales shall severally name a sufficient deputy, who shall be resident or have an office within one mile from the Inner Temple Hall, for the receipt of writs, granting warrants thereon, making returns thereto, and accepting of all rules and orders to be made on or touching the execution of any process or writ to be directed to such sheriff.

Sheriffs to name deputies to be resident in London.

XXI. And be it further enacted, That it shall be lawful for the defendant in all personal actions, (except actions for assault and battery, false imprisonment, libel, slander, malicious arrest or prosecution, criminal conversation, or debauching of the plaintiff's daughter or servant), by leave of any of the said superior courts where such action is pending, or a judge of any of the said superior courts, to pay into court a sum of money by way of compensation or amends, in

Defendant to be allowed to pay money into court in certain actions by judge's order.

3 & 4 W. 4, c. 42.

such manner and under such regulations as to the payment of costs and the form of pleading, as the said judges, or such eight or more of them as aforesaid, shall, by any rules or orders by them to be from time to time made, order and direct (*e*).

Power to direct local actions to be tried in any county.

XXII. And whereas unnecessary delay and expense is sometimes occasioned by the trial of local actions in the county where the cause of action has arisen; be it therefore enacted, That, in any action depending in any of the said superior courts, the venue in which is by law local, the court in which such action shall be depending, or any judge of any of the said courts, may, on the application of either party, order the issue to be tried, or writ of inquiry to be executed, in any other county or place than that in which the venue is laid; and for that purpose any such court or judge may order a suggestion to be entered on the record, that the trial may be more conveniently had, or writ of inquiry executed, in the county or place where the same is ordered to take place.

Allowing amendments to be made on the record in certain cases.

XXIII. And whereas great expense is often incurred, and delay or failure of justice takes place, at trials, by reason of variances as to some particular or particulars between the proof and the record or setting forth on the record or document on which the trial is had, of contracts, customs, prescriptions, names, and other matters or circumstances not material to the merits of the case, and by the mis-statement of which the opposite party cannot have been prejudiced, and the same cannot in any case be amended at the trial, except where the variance is between any matter in writing or in print produced in evidence and the record: And whereas it is expedient to allow such amendments as herein-after mentioned to be made on the trial of the cause: be it therefore enacted, That it shall be lawful for any court of record holding plea in civil actions, and any judge sitting at Nisi Prius, if such court or judge shall see fit so to do, to cause the record, writ, or document on which any trial may be pending before any such court or judge, in any civil action, or in any information in the nature of a quo warranto,

(*e*) For the previous state of the law, and the reasons for the proposed alteration, see the second Report of the common law commissioners.

or proceedings on a mandamus, when any variance shall appear between the proof and the recital or setting forth on the record, writ, or document on which the trial is proceeding, of any contract, custom, prescription, name, or other matter, in any particular or particulars in the judgment of such court or judge not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence, to be forthwith amended by some officer of the court or otherwise, both in the part of the pleadings where such variance occurs, and in every other part of the pleadings which it may become necessary to amend, on such terms, as to payment of costs to the other party, or postponing the trial to be had before the same or another jury, or both payment of costs and postponement, as such court or judge shall think reasonable; and in case such variance shall be in some particular or particulars in the judgment of such court or judge not material to the merits of the case, but such as that the opposite party may have been prejudiced thereby in the conduct of his action, prosecution, or defence, then such court or judge shall have power to cause the same to be amended upon payment of costs to the other party, and withdrawing the record or postponing the trial as aforesaid, as such court or judge shall think reasonable; and after any such amendment the trial shall proceed, in case the same shall be proceeded with, in the same manner in all respects, both with respect to the liability of witnesses to be indicted for perjury, and otherwise, as if no such variance had appeared; and in case such trial shall be had at Nisi Prius or by virtue of such writ as aforesaid, the order for the amendment shall be indorsed on the postea, or the writ, as the case may be, and returned together with the record or writ; and thereupon such papers, rolls, and other records of the court from which such record or writ issued, as it may be necessary to amend, shall be amended accordingly; and in case the trial shall be had in any court of record, then the order for amendment shall be entered on the roll or other document upon which the trial shall be had; provided that it shall be lawful for any party who is dissatisfied with the decision of such judge at Nisi Prius, sheriff, or

3 & 4 W. 4, c. 42.

3 & 4 W. 4, c. 42.

other officer, respecting his allowance of any such amendment, to apply to the court from which such record or writ issued for a new trial upon that ground, and in case any such court shall think such amendment improper, a new trial shall be granted accordingly, on such terms as the court shall think fit, or the court shall make such other order as to them may seem meet.

Power for the court or judge to direct the facts to be found specially.

XXIV. And be it further enacted, That the said court or judge shall and may, if they or he think fit, in all such cases of variance, instead of causing the record or document to be amended as aforesaid, direct the jury to find the fact or facts, according to the evidence, and thereupon such finding shall be stated on such record or document, and, notwithstanding the finding on the issue joined, the said court, or the court from which the record has issued shall, if they shall think the said variance immaterial to the merits of the case, and the mis-statement such as could not have prejudiced the opposite party in the conduct of the action or defence, give judgment according to the very right and justice of the case.

Power to state a special case without proceeding to trial.

XXV. And be it further enacted, That it shall be lawful for the parties in any action or information, after issue joined, by consent and by order of any of the judges of the said superior courts, to state the facts of the case, in the form of a special case, for the opinion of the court, and to agree that a judgment shall be entered for the plaintiff or defendant by confession, or of nolle prosequi, immediately after the decision of the case, or otherwise, as the court may think fit; and judgment shall be entered accordingly.

Witnesses interested solely on account of the verdict to be admissible.

XXVI. And in order to render the rejection of witnesses on the ground of interest less frequent, be it further enacted, That, if any witness shall be objected to as incompetent, on the ground that the verdict or judgment in the action, on which it shall be proposed to examine him, would be admissible in evidence for or against him, such witness shall nevertheless be examined, but, in that case, a verdict or judgment in that action in favour of the party on whose behalf he shall have been examined, shall not be admissible in evidence for him or any one claiming under him, nor shall a verdict or judgment against the party on whose behalf he shall have

been examined be admissible in evidence against him or any one claiming under him.

Direction to indorse the name of the witness on the record.

XXVII. And be it further enacted, That the name of every witness objected to as incompetent on the ground that such verdict or judgment would be admissible in evidence for or against him, shall at the trial be indorsed on the record or document on which the trial shall be had, together with the name of the party on whose behalf he was examined, by some officer of the court, at the request of either party, and shall be afterwards entered on the record of the judgment; and such indorsement or entry shall be sufficient evidence that such witness was examined, in any subsequent proceeding in which the verdict or judgment shall be offered in evidence.

Jury empowered to allow interest upon debts.

XXVIII. And be it further enacted, That, upon all debts or sums certain, payable at a certain time or otherwise, the jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or, if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment; provided that interest shall be payable in all cases in which it is now payable by law.

In certain actions the jury may give damages in the nature of interest.

XXIX. And be it further enacted, That the jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, give damages in the nature of interest, over and above the value of the goods at the time of the conversion or seizure, in all actions of trover or trespass de bonis asportatis, and over and above the money recoverable in all actions on policies of assurance made after the passing of this act.

Interest to be allowed on all writs of error for the time that execu-

XXX. And be it further enacted, That, if any person shall sue out any writ of error, upon any judgment whatsoever, given in any court in any action personal, and the court of error shall give judgment for the defendant there-

3 & 4 W. 4, c. 42.

on, then interest shall be allowed by the court of error for such time as execution has been delayed by such writ of error, for the delaying thereof.

tion has been delayed.

Executors suing in right of the testator, to pay costs.

XXXI. And be it further enacted, That, in every action brought by any executor or administrator in right of the testator or intestate, such executor or administrator shall, unless the court in which such action is brought, or a judge of any of the said superior courts, shall otherwise order, be liable to pay costs to the defendant in case of being non-suited, or a verdict passing against the plaintiff, and in all other cases in which he would be liable, if such plaintiff were suing in his own right upon a cause of action accruing to himself; and the defendant shall have judgment for such costs, and they shall be recovered in like manner.

One or more of several defendants in any action having a nolle prosequi, or a verdict, shall have costs.

XXXII. And be it further enacted, That, where several persons shall be made defendants in any personal action, and any one or more of them shall have a nolle prosequi entered as to him or them, or upon the trial of such action shall have a verdict pass for him or them, every such person shall have judgment for and recover his reasonable costs, unless, in the case of a trial, the judge before whom such cause shall be tried shall certify upon the record, under his hand, that there was a reasonable cause for making such person a defendant in such action.

Where nolle prosequi entered upon any count, &c.

XXXIII. And be it further enacted, That, where any nolle prosequi shall have been entered upon any count, or as to part of any declaration, the defendant shall be entitled to, and have judgment for, and recover his reasonable costs in that behalf.

Plaintiff in scire facias, and plaintiff or defendant on demurrer, to have costs.

XXXIV. And be it further enacted, That, in all writs of scire facias the plaintiff obtaining judgment on an award of execution, shall recover his costs of suit upon a judgment by default, as well as upon a judgment after plea pleaded or demurrer joined; and that, where judgment shall be given either for or against a plaintiff or demandant, or for or against a defendant or tenant, upon any demurrer joined in any action whatever, the party in whose favour such judgment shall be given shall also have judgment to recover his costs in that behalf.

Costs of spe-

XXXV. And whereas, it is provided in and by a statute

passed in the sixth year of the reign of his late Majesty, intituled "An Act for consolidating and amending the law relative to jurors and juries," that the person or party who shall apply for a special jury shall pay the fees for striking such jury, and all the expenses occasioned by the trial of the cause by the same, and shall not have any further or other allowance for the same, upon taxation of costs, than such person or party would be entitled unto in case the cause had been tried by a common jury, unless the judge before whom the cause is tried shall, immediately after the verdict, certify under his hand, upon the back of the record, that the same was a cause proper to be tried by a special jury: And whereas, the said provision does not apply to cases in which the plaintiff has been nonsuited, and it is expedient that the judge should have such power of certifying, as well when a plaintiff is nonsuited, as when he has a verdict against him; be it therefore enacted, That the said provision of the said last-mentioned act of parliament, and every thing therein contained, shall apply to cases in which the plaintiff shall be nonsuited, as well as to cases in which a verdict shall pass against him.

3 & 4 W. 4, c. 42. Special juries in case of a nonsuit. 6 G. 4, c. 50.

XXXVI. And whereas, it would tend to the better dispatch of business, and would be more convenient, and better assimilate the practice, and promote uniformity in the allowance of costs, if the officers on the plea side of the courts of King Bench and Exchequer, and the officers of the court of Common Pleas at Westminster, who now perform the duties of taxing costs, were to be empowered to tax costs which have arisen, or may arise, in each of the said courts indiscriminately; be it therefore enacted, That it shall be lawful for the judges of the said courts, or such eight or more of them as aforesaid, by any rule or order to be from time to time made, in term or vacation, to make such regulations for the taxation of costs by any of the said officers of the said courts indiscriminately as to them may seem expedient, although such costs may not have arisen in respect of business done in the court to which such officer belongs, and to appoint some convenient place in which the business of taxation shall be transacted for all the said

Power to make regulations as to the officers of each court at Westminster taxing costs.

3 & 4 W. 4, c. 42.

courts, and to alter the same when and as it may seem to them expedient.

Executors of lessor may distrain for arrears in his lifetime.

XXXVII. And be it further enacted, That it shall be lawful for the executors or administrators of any lessor or landlord, to distrain upon the lands demised for any term, or at will, for the arrearages of rent due to such lessor or landlord in his lifetime, in like manner as such lessor or landlord might have done in his lifetime.

Arrears may be distrained for within six months after determination of term.

XXXVIII. And be it further enacted, that such arrearages may be distrained for after the end or determination of such term or lease at will, in the same manner as if such term or lease had not been ended or determined; provided that such distress be made within the space of six calendar months after the determination of such term or lease, and during the continuance of the possession of the tenant from whom such arrears became due: Provided also, that all and every the powers and provisions in the several statutes made relating to distresses for rent, shall be applicable to the distresses so made as aforesaid.

Submission to arbitration by rule of court, &c. not to be revocable without leave of the court.

XXXIX. And whereas it is expedient to render references to arbitration more effectual (*f*): be it further enacted, That the power and authority of any arbitrator or umpire appointed by or in pursuance of any rule of court, or judge's order, or order of Nisi Prius, in any action now brought, or which shall be hereafter brought, or by or in pursuance of any submission to reference containing an agreement that such submission shall be made a rule of any of his Majesty's courts of record, shall not be revocable by any party to such reference, without the leave of the court by which such rule or order shall be made or which shall be mentioned in such submission, or by leave of a judge; and the arbitrator or umpire shall and may and is hereby required to proceed with the reference notwithstanding any such revocation, and to make such award, although the person making such revocation shall not afterwards attend the reference; and that the court, or any judge thereof, may

(*f*) The grounds of this and the two following sections will be found in the second Report of the common law commissioners.

from time to time enlarge the term for any such arbitrator making his award.

Power to compel the attendance of witnesses.

XL. And be it further enacted, That, when any reference shall have been made by any such rule or order as aforesaid, or by any submission containing such agreement as aforesaid, it shall be lawful for the court by which such rule or order shall be made, or which shall be mentioned in such agreement, or for any judge, by rule or order to be made for that purpose, to command the attendance and examination of any person to be named, or the production of any documents to be mentioned in such rule or order; and the disobedience to any such rule or order shall be deemed a contempt of court, if, in addition to the service of such rule or order, an appointment of the time and place of attendance in obedience thereto, signed by one at least of the arbitrators, or by the umpire, before whom the attendance is required, shall also be served either together with or after the service of such rule or order: Provided always, that every person whose attendance shall be so required, shall be entitled to the like conduct money and payment of expenses and for loss of time as for and upon attendance at any trial: Provided also, that the application made to such court or judge for such rule or order shall set forth the county where such witness is residing at the time, or satisfy such court or judge that such person cannot be found: Provided also, that no person shall be compelled to produce, under any such rule or order, any writing or other document that he would not be compelled to produce at a trial, or to attend at more than two consecutive days, to be named in such order.

Power for the arbitrators under a rule of court to administer an oath.

XLI. And be it further enacted, That, when in any rule or order of reference, or in any submission to arbitration containing an agreement that the submission shall be made a rule of court, it shall be ordered or agreed that the witnesses upon such reference shall be examined upon oath, it shall be lawful for the arbitrator or umpire, or any one arbitrator, and he or they are hereby authorized and required, to administer an oath to such witnesses, or to take their affirmation in cases where affirmation is allowed by law instead of oath; and if upon such oath or affirmation any per-

3 & 4 W. 4, c. 42.

son making the same shall wilfully and corruptly give any false evidence, every person so offending shall be deemed and taken to be guilty of perjury, and shall be prosecuted and punished accordingly.

Power of granting commissions to take affidavits to extend to Scotland and Ireland.

XLII. And whereas it would be convenient if the power of the superior courts of common law and equity at Westminster to grant commissions for taking affidavits to be used in the said courts respectively should be extended; be it further enacted by the authority aforesaid, That the Lord High Chancellor, lord keeper, or lords commissioners of the great seal, the said courts of law, and the several judges of the same, shall have such and the same powers for granting commissions for taking and receiving affidavits in Scotland and Ireland, to be used and read in the said courts respectively, as they now have in all and every the shires and counties within the kingdom of England, and dominion of Wales, and town of Berwick-upon-Tweed, and the Isle of Man, by virtue of the statutes now in force; and that all and every person and persons wilfully swearing or affirming falsely in any affidavit to be made before any person or persons who shall be so empowered to take affidavits under the authority aforesaid, shall be deemed guilty of perjury, and shall incur and be liable to the same pains and penalties as if such person had wilfully sworn or affirmed falsely in the open court in which such affidavit shall be intitled, and be liable to be prosecuted for such perjury in any court of competent jurisdiction in that part of the United Kingdom in which such offence shall have been committed, or in that part of the United Kingdom in which such person shall be apprehended on such a charge.

For the abolition of certain holidays.

XLIII. And whereas the observance of holidays in the said courts of common law during term time, and in the offices belonging to the same, on the several days on which holidays are now kept, is very inconvenient, and tends to delay in the administration of justice; be it therefore enacted by the authority aforesaid, That none of the several days mentioned in the statute passed in the sessions of parliament holden in the fifth and sixth years of the reign of King Edward the Sixth, intituled "An Act for keeping holidays and fasting days," shall be observed or kept in

5 & 6 Edw. 6, c. 3.

the said courts, or in the several offices belonging thereto, except Sundays, the day of the nativity of our Lord, and the three following days, and Monday and Tuesday in Easter week. 3 & 4 W. 4, c. 42.

XLIV. And be it further enacted, That this statute shall commence and take effect on the first day of June, one thousand eight hundred and thirty-three. Commencement of act.

XLV. And be it further enacted, That nothing in this act shall extend to that part of the United Kingdom called Ireland, or that part of the United Kingdom called Scotland, except in the cases herein-before specially mentioned. Not to extend to Ireland or Scotland.

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